84-470

No. 84-

Office-Supreme Court, U.S.
FILED
SEP 24 1984
ALEXANDER L. STEVAS,
CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1984

WEYERHAEUSER COMPANY,
Petitioner,

v.

WESTERN SEAS SHIPPING COMPANY,
EASTERN SEAS SHIPPING COMPANY, and
KARLANDER (AUSTRALIA) PTY. LTD.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

PETITION FOR WRIT OF CERTIORARI

Of Counsel:
JOHN M. ANDERSON
AMY SLATER
LANDELS, RIPLEY & DIAMOND
450 Pacific Avenue
San Francisco, CA 94133

RICHARD H. SOMMER
WILLIAM XANTTOPOULOS
ARTHUR E. HOFFMANN, JR.
KIRLIN, CAMPBELL & KEATING
120 Broadway
New York, NY 10271

DONALD I. BAKER
Counsel of Record
JOHN R. MUNICH
SUTHERLAND, ASBILL & BRENNAN
1666 K Street, N.W., Suite 800
Washington, D.C. 20006
(202) 872-7800
Counsel for Petitioner

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

7318

QUESTIONS PRESENTED

Do the United States Arbitration Act and the Federal Rules of Civil Procedure authorize a District Court to compel consolidation of related but separate maritime arbitration proceedings involving "not only common questions of law and fact in the two arbitrations but . . . a danger of conflicting findings?"

Can such consolidation be ordered where it is "in the interest of justice" (as the Second Circuit has found) or only where there is "a written agreement providing for consolidated arbitration" (as the Ninth Circuit has found)?

PARTIES INVOLVED

All parties to the proceeding below are named in the caption of the case in this Court except for Trans-Pacific Shipping Co., which is the successor in interest to Respondents Western Seas Shipping Co. and Eastern Seas Shipping Co. This information is provided pursuant to Supreme Court Rule 21.1(b).

The affiliates and subsidiaries of Weyerhaeuser are: Camac Veneer, Inc.; Mountain Tree Farm Co.; North Pacific Paper Corp.; Shemin Nurseries, Inc.; Weyerhaeuser International, Inc.; de Bes' Insurance, Ltd.; Forest Insurance, Ltd.; Kennedy Bay Timber Sendirian Berhad; Silam Forest Products Sendirian Berhad; Pacific Hardwoods Sendirian Berhad; Weyerhaeuser Europe, S.A.; and Cornerstone Development Co. This information is provided pursuant to Supreme Court Rule 28.1.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
PARTIES INVOLVED	ii
TABLE OF AUTHORITIES	v
OPINIONS BELOW	1
JURISDICTION	2
STATUTORY PROVISIONS AND RULES OF PROCEDURE INVOLVED	2
STATEMENT	4
1. The District Court Decision	7
2. The Court of Appeals Decision	8
REASONS FOR GRANTING THE WRIT OF CERTIORARI	9
I. The Decision Of The Ninth Circuit Is In Square Conflict With A Decision Of The Second Circuit On An Important Question Of Maritime Law	9
A. The Ninth Circuit's Opinion Recognized the Conflict	9
B. *Compania Espanola* Did Not Turn on "Implicit Consent to Joint Arbitration"	10
II. The Question Presented Here Involves A Recurrent Situation In Maritime Practice And Hence The Confusion Caused By The Decision Below Will Be Particularly Disruptive	13
A. The Issue Here is a Recurring One in the Maritime Industry and in the Federal Courts	13

TABLE OF CONTENTS—Continued

Page

B. The Effects of the Decision Below on the Maritime Industry 15

C. The Need for a Uniform Rule 17

III. The Ninth Circuit's Decision Has Artificially Constrained The Arbitration Process; It Will Tend To Discourage The Use Of Arbitration, To The Detriment Of Both Disputants And The Federal Courts 17

CONCLUSION 21

APPENDIX A-1

TABLE OF AUTHORITIES

Cases: Page

Brownko Int'l, Inc. v. Ogden Steel Co., 585 F. Supp. 1432 (S.D.N.Y. 1983) 13, 15
Chilean Nitrate & Iodine Sales v. Intermarine Corp., 1972 A.M.C. 2460 (S.D.N.Y. 1971) 14
Cleveland Board of Education v. La Fleur, 414 U.S. 632 (1974) 13
Compania Espanola de Petroleos, S.A. v. Nereus Shipping, S.A., 527 F.2d 966 (2d Cir. 1975), *cert. denied*, 426 U.S. 936 (1976) ..... *passim*
Diapulse Corp. v. Carba, Ltd., 626 F.2d 1108 (2d Cir. 1980) 18
Fields v. Wolfson, 41 F.R.D. 329 (S.D.N.Y. 1967) .. 19
Gavlik Const. Co. v. H.F. Campbell Co., 526 F.2d 777 (3d Cir. 1975) 14
Hanna v. Plumer, 380 U.S. 460 (1965) 17
Huber, Hunt & Nichols, Inc. v. Architectural Stone Co., 625 F.2d 22 (5th Cir. 1980) 14
In re Czarnikow-Rionda Co. v. Eddie Steamship Co., 1975 A.M.C. 1116 (S.D.N.Y. 1972) 14
In re General Navigation, Inc. v. Sameit Dea Brovig, 1981 A.M.C. 1781 (S.D.N.Y. 1981) 14
In re Voest-Alpine Int'l, Inc. v. Supreme Maritime Ltd., 1982 A.M.C. 921 (S.D.N.Y. 1982) 14
Lavino Shipping Co. v. Santa Cecilia Co., S.A., 1972 A.M.C. 2454 (S.D.N.Y. 1972) 14
Maritime Trading Ltd. v. Ore Int'l Corp., 432 F. Supp. 683 (S.D.N.Y. 1977) 14
Maryland v. United States, 381 U.S. 41, *vacated on other grounds*, 382 U.S. 159 (1965) 14
Massachusetts Trustees v. United States, 377 U.S. 235 (1964) 14
Robinson v. Warner, 370 F. Supp. 828 (D.R.I. 1974) 15
Showa Shipping Co. v. A/B Bellis, 1972 A.M.C. 2458 (S.D.N.Y. 1972) 14
The Daniel Ball, 77 U.S. (10 Wall.) 557 (1871) 17
Weyerhaeuser Co. v. Western Seas Shipping Co., 568 F. Supp. 1220 (N.D. Cal. 1983) ..... *passim*

TABLE OF AUTHORITIES—Continued

Page

Weyerhaeuser Co. v. Western Seas Shipping Co., No. 83-2411, D.C. No. C83-3159 WWS, slip op. (9th Cir. June 22, 1984), *aff'g* 568 F. Supp. 1220 (N.D. Cal. 1983) ..... *passim*

Constitutional Provisions:

Article I, § 8, Cl. 3 17

Statutes:

9 U.S.C. § 1 (1982) 2
9 U.S.C. §§ 1-14 (1982) 7
9 U.S.C. § 3 (1982) 15
9 U.S.C. § 4 (1982) 2
9 U.S.C. § 9 (1982) 20
9 U.S.C. § 10 (1982) 20
9 U.S.C. § 11 (1982) 20
28 U.S.C. § 1254(1) (1982) 2
28 U.S.C. § 1333(1) (1982) 7, 20

Legislative Materials:

Arbitration of Interstate Commercial Disputes: Joint Hearings on S. 1005 and H.R. 646 Before the Subcomms. of the Comms. on the Judiciary, 68th Cong., 1st Sess. (1924) 18
H.R. Rep. No. 96, 68th Cong., 1st Sess. (1924) 18

Rules:

Supreme Court Rule 21.1(b) ii
Supreme Court Rule 28.1 ii
Federal Rule of Civil Procedure 42(a) 4, 7, 8, 16, 17, 19
Federal Rule of Civil Procedure 81(a)(3) 4, 7, 8, 17

Other:

G. Gilmore & C. Black, Jr., *The Law of Admiralty* (2d ed. 1975) 5, 14, 15, 17, 19
M. Wilford, T. Coghlin, N. Healy, Jr. & J. Kimball, *Time Charters* (2d ed. 1982) 13
The Journal of Commerce (New York: July 17, 1984) 16
Society of Maritime Arbitrators, Inc., *Award Service of the Society of Maritime Arbitrators* (1975-83) 16
9 C. Wright & A. Miller, *Federal Practice and Procedure: Civil* § 2381 (1971) 16

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

No. 84-

WEYERHAEUSER COMPANY,
Petitioner,

v.

WESTERN SEAS SHIPPING COMPANY,
EASTERN SEAS SHIPPING COMPANY, and
KARLANDER (AUSTRALIA) PTY. LTD.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

PETITION FOR WRIT OF CERTIORARI

The petitioner, Weyerhaeuser Company, respectfully prays that a writ of certiorari be issued to review the decision of the Ninth Circuit in this case, entered on June 22, 1984.

OPINIONS BELOW

The opinion of the Court of Appeals was reported at No. 83-2411, D.C. No. C83-3159 WWS, slip op. (9th Cir. June 22, 1984) and is set forth in the Appendix, *infra*, pp. A-1 to A-5. The decision and order of the United States District Court for the Northern District

of California is reported at 568 F. Supp. 1220, and appears in the Appendix, *infra*, pp. A-7 to A-11.

JURISDICTION

The Opinion of the Court of Appeals for the Ninth Circuit was entered on June 22, 1984. By order dated September 4, 1984, the Court's mandate was stayed until September 24, 1984, pending Weyerhauser's petition for certiorari. On August 16, 1984, the Court denied Weyerhaeuser's petition for rehearing and rehearing en banc. The order of denial is set out at *infra*, p. A-6.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) (1982).

STATUTORY PROVISIONS AND RULES OF PROCEDURE INVOLVED

Section 1 of the United States Arbitration Act, 9 U.S.C. § 1 (1982), provides:

> "Maritime transactions", as herein defined, means charter parties, bills of lading of water carriers, agreements relating to wharfage, supplies furnished vessels or repairs to vessels, collisions, or any other matters in foreign commerce which, if the subject of controversy, would be embraced within admiralty jurisdiction; "commerce", as herein defined, means commerce among the several States or with foreign nations, or in any Territory of the United States or in the District of Columbia, or between any such Territory and another, or between any such Territory and any State or foreign nation, or between the District of Columbia and any State or Territory or foreign nation, but nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce.
>
> (July 30, 1947, ch. 392, 61 Stat. 670.)

Section 4 of the United States Arbitration Act, 9 U.S.C. § 4 (1982) provides:

A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court which, save for such agreement, would have jurisdiction under title 28, in a civil action or in admiralty of the subject matter of a suit arising out of the controversy between the parties, for an order directing that such arbitration proceed in the manner provided for in such agreement. Five days' notice in writing of such application shall be served upon the party in default. Service thereof shall be made in the manner provided by the Federal Rules of Civil Procedure. The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement. The hearing and proceedings, under such agreement, shall be within the district in which the petition for an order directing such arbitration is filed. If the making of the arbitration agreement or the failure, neglect, or refusal to perform the same be in issue, the court shall proceed summarily to the trial thereof. If no jury trial be demanded by the party alleged to be in default, or if the matter in dispute is within admiralty jurisdiction, the court shall hear and determine such issue. Where such an issue is raised, the party alleged to be in default may, except in cases of admiralty, on or before the return day of the notice of application, demand a jury trial of such issue, and upon such demand the court shall make an order referring the issue or issues to a jury in the manner provided by the Federal Rules of Civil Procedure, or may specially call a jury for that purpose. If the jury find that no agreement in writing for arbitration was made or that there is no default in proceeding thereunder, the proceeding shall be dismissed. If the jury find that an agreement for arbitration was made in writing and that there is a default in proceeding thereunder, the

> court shall make an order summarily directing the parties to proceed with the arbitration in accordance with the terms thereof.
>
> (July 30, 1947, ch. 392, 61 Stat. 671; Sept. 3, 1954, ch. 1263, § 19, 68 Stat. 1233.)

Rule 42(a) of the Federal Rules of Civil Procedure provides:

> When actions involving a common question of law or facts are pending before the court, it may order a joint hearing or trial of any or all the matters in issue in the actions; it may order all the action consolidated; and it may make such orders concerning proceedings therein as may tend to avoid unnecessary costs or delay.

Rule 81(a)(3) of the Federal Rules of Civil Procedure provides:

> In proceedings under Title 9, U.S.C., relating to arbitration, or under the Act of May 20, 1926, ch. 347, § 9 (44 Stat. 585), U.S.C. Title 45, § 159, relating to boards of arbitration of railway labor disputes, these rules apply only to the extent that matters of procedure are not provided for in those statutes. These rules apply to proceedings to compel the giving of testimony or production of documents in accordance with a subpoena issued by an officer or agency of the United States under any statute of the United States except as otherwise provided by statute or by rules of the district court or by order of the court in the proceedings.

STATEMENT

This case concerns a controversy arising out of the use of two ships—the PACDUKE and the PACDUCHESS. The relevant facts are not in dispute.

The PACDUKE and the PACDUCHESS are owned by Western Seas Shipping Co. and Eastern Seas Shipping Co. ("the Owners"). In March 1974, the Owners time-

chartered both vessels to Weyerhaeuser.[1] Weyerhaeuser subsequently subchartered the two vessels to Karlander (Australia) Pty., Ltd. ("Karlander") on terms virtually identical to the charter agreement with the Owners.

The charter and the subcharter agreements contain identical arbitration clauses, which read as follows:

> That should any dispute arise between Owners and the Charterers, the matter in dispute shall be referred to three persons at San Francisco, one to be appointed by each of the parties hereto, and the third by the two so chosen; their decision or that of any two of them, shall be final and for the purpose of enforcing any award, this agreement may be made a rule of the Court. The arbitrators shall be commercial men conversant with shipping matters. CR 2 at Exhibit A, page 3/Excerpt 16 and Exhibit B, page 3/Excerpt 42.[2]

This clause is part of the New York Produce Exchange form for time charters, the most commonly used form in the industry.[3]

During the subcharter, the Owners navigated and managed the vessels. The charter agreement between the

---

[1] A time charter "is used where the charterer's affairs make it desirable for him to have tonnage under his control for a period of time, without undertaking the responsibilities of ship navigation and management or the long-term financial commitments of vessel ownership."

In a time charter "as in the voyage charter, the owner's people continue to navigate and manage the vessel, but [the vessel's] carrying capacity is taken by the charterer for a fixed time for the carriage of goods anywhere in the world (or anywhere within stipulated geographic limits) on as many voyages as approximately fit into the charter period. She is therefore under the charterer's orders as to ports touched, cargo loaded, and other business matters." G. Gilmore & C. Black, Jr., *The Law of Admiralty* 193-194 (2d ed. 1975).

[2] Citations to the record below are to the Court Record, cited CR.

[3] *See* discussion at *infra* pp. 13-14; Appendix at A-26, A-32.

Owners and Weyerhaeuser provided that Weyerhaeuser was to designate the ports of call, select the cargoes to be loaded and use "the whole reach of the vessel's Hold, Decks and usual places of loading." CR 2 at 3, 29/Excerpts 15, 41. Pursuant to the subcharter, Weyerhaeuser's rights to use the vessels passed to Karlander.

In 1979, during the subcharter, a dispute arose concerning cargo stowage restrictions. The essence of the dispute is simple. Karlander wanted to carry containers beneath the decks of the vessels. The Owners refused to permit this on the basis that the Lloyds Classification Society prohibited underdeck container stowage. CR 2 at 82/Excerpt 94. Weyerhaeuser notified Karlander of the Owners' position. CR 1 at 4/Excerpt 6. Karlander has objected to the stowage restrictions and currently claims damages totalling $30,000,000. CR 1 at 6/Excerpt 8.

On March 4, 1983, Karlander demanded arbitration with Weyerhaeuser. CR 1 at 7/Excerpt 9. On March 23, 1983, Weyerhaeuser in turn demanded arbitration with the Owners on the ground that its position vis-a-vis the Owners was no different from that of Karlander; if the stowage restrictions were found unreasonable Karlander would recover from Weyerhaeuser and Weyerhaeuser in turn would recover from the Owners. CR 1 at 7/Excerpt 9. The parties agree that the dispute over the use of the PACDUKE and the PACDUCHESS may be referred to arbitration under the arbitration clauses contained in the charter and the subcharter.

Weyerhaeuser has been nothing more than a conduit in the dispute between the Owners and Karlander. Weyerhaeuser's principal involvement has been to forward telex messages between the Owners and Karlander. CR 1 at 4-6/Excerpts 6-8, CR 2 at 107-116/Excerpts 94-103. Karlander's recognition of Weyerhaeuser's lack of involvement led Karlander's European representative to telex Weyerhaeuser: "We take it however, that in reality this is a dispute between Karlander and Owners,

and that your organization [Weyerhaeuser] will hardly be involved." CR 2 at 91/Excerpt 104.

On June 30, 1983, Weyerhaeuser, concerned that it could be the victim of inconsistent awards were the two arbitrations to proceed separately,[4] petitioned the United States District Court for an order consolidating the arbitration between Weyerhaeuser and Karlander with the arbitration between Weyerhaeuser and the Owners. Both the Owners and Karlander objected to Weyerhaeuser's request for consolidation.

1. The District Court Decision

Because the dispute among Weyerhaeuser, Karlander, and the Owners involved a maritime matter, jurisdiction lay in the District Court pursuant to 28 U.S.C. § 1333 (1). The District Court rejected Weyerhaeuser's assertion that the court had authority under the United States Arbitration Act, 9 U.S.C. §§ 1-14 (1982), and Rules 42(a) and 81(a)(3) of the Federal Rules of Civil Procedure to consolidate the two separate arbitrations into one proceeding. The court declined to follow the numerous decisions that have permitted consolidation on this basis and instead, reaching a conclusion contrary to any reported federal decision,[5] chose to read its authority narrowly under the Arbitration Act. 568 F. Supp. at 1221-22, Appendix at A-8 to A-9. The court stated that its authority under the statute was limited to determining whether an arbitration agreement exists, and if it does, to enforcing the contract according to its terms. 568 F. Supp. at 1221-22, Appendix at A-8 to A-9.

The court noted that the Second Circuit, in *Compania Espanola de Petroleos, S.A. v. Nereus Shipping, S.A.*, 527 F.2d 966 (2d Cir. 1975), *cert. denied*, 426 U.S. 936 (1976), had reached the opposite conclusion on this issue

---

[4] *See infra* note 17.

[5] *See infra* note 11.

as had other courts as well. 568 F. Supp. at 1222, Appendix at A-9 to A-10. The District Court purported to distinguish *Compania Espanola* on the ground that the parties there had consented to consolidation of the arbitrations. Alternately, the District Court stated that "[i]nsofar as [*Compania Espanola* and other] decisions find authority in Rules 81(a)(3) and 42(a) to order consolidated arbitration in the absence of consent by the parties, this Court is in disagreement with them" and declines to follow them. 568 F. Supp. at 1222-23, Appendix at A-11.[6] Accordingly, the District Court denied Weyerhaeuser's petition to compel consolidated arbitration. 568 F. Supp. at 1223, Appendix at A-11.

2. The Court of Appeals Decision

On appeal from the District Court's order, the Ninth Circuit affirmed. The court devoted nearly all of its brief opinion to distinguishing *Compania Espanola*. Appendix at A-3 to A-4. Tracking the district court's analysis, the Court of Appeals read *Compania Espanola* as holding that the parties to the arbitration there had consented to consolidated arbitration. Appendix at A-3. The court held, therefore, "[i]nsofar as *Companis* [sic] *Espanola* rests on the consent of the parties it is distinguishable from the present case." Appendix at A-3.

As an alternate ground for its decision, the Court of Appeals stated that "[i]nsofar as *Compania* holds that federal courts may order consolidation in the absence of consent, we decline to follow it." Appendix at A-4. The court went on to say that it agreed with the District Court's narrow view of a federal court's authority under the Arbitration Act. "Thus," said the court, "we can only determine whether a written arbitration agreement

---

[6] The District Court expressly noted that "several cases . . . all from the Southern District of New York, have adopted [*Compania Espanola's*] broader dictum. . . ." 568 F. Supp. at 1222, Appendix at A-10 to A-11.

exists, and if it does, enforce it 'in accordance with its terms.'" Appendix at A-4. Finding no express agreement to consolidate the arbitrations, the court affirmed the District Court's ruling. Appendix at A-5.

REASONS FOR GRANTING THE WRIT OF CERTIORARI

I. The Decision Of The Ninth Circuit Is In Square Conflict With A Decision Of The Second Circuit On An Important Question Of Maritime Law.

A. The Ninth Circuit's Opinion Recognized the Conflict.

The Court of Appeals, in affirming the District Court's decision denying Weyerhaeuser's request for consolidation, essentially tracked the District Court's reasoning. *Cf.* 568 F. Supp. 1220 (N.D. Cal. 1983), *see infra* p. A-7. Both flatly rejected Weyerhaeuser's reliance upon *Compania Espanola de Petroleos, S.A. v. Nereus Shipping, S.A.*, 527 F.2d 996 (2d Cir. 1975), *cert. denied*, 426 U.S. 936 (1976). The Court of Appeals thus created an entirely different situation from that faced by this Court when it denied certiorari in *Compania Espanola* eight years ago.

The Ninth Circuit characterized *Compania Espanola* as "relying on two grounds:" first, that all three parties had signed a document which "amounted to implicit consent to joint arbitration in the event of dispute," Appendix at A-3; and second, that the "'liberal purposes of the Federal Arbitration Act clearly require that this act be interpreted so as to permit and even to encourage the consolidation of arbitration proceedings in proper cases. . . .'" Appendix at A-3 (quoting *Compania Espanola*, 526 F.2d at 975).

The Ninth Circuit's reliance on the first "ground" is simply wrong, for reasons we shall demonstrate in the next section; consent to consolidation was not discussed or found to exist by the Second Circuit in *Compania Espanola.* The Ninth Circuit's treatment of the second

(and, we submit, only) "ground" was to reject it: "[*i*]*nsofar as* Compania *holds that federal courts may order consolidation in the absence of consent, we decline to follow it.*" Appendix at A-4 (emphasis added). Thus, for the Ninth Circuit, "the only issue properly before this Court [was] whether Weyerhaeuser, Karlander, and Trans-Pacific are parties to a written agreement providing for consolidated arbitration." Appendix at A-5.

B. *Compania Espanola* Did Not Turn on "Implicit Consent to Joint Arbitration."

In *Compania Espanola*, the shipowner ("Nereus") had entered into a charter agreement with "Hideca," the charterer; the agreement contained an arbitration clause. Compania Espanola, Hideca's guarantor, had agreed to stand in the shoes of Hideca should a default occur, but did not expressly consent to an arbitration clause. A dispute arose, which led eventually to the case before the Second Circuit. Judge Medina, writing for the Court of Appeals, outlined the issues raised by the District Court's opinion as follows:

> 1) Did the guarantor agree to arbitrate;
>
> 2) Was it proper for the District Judge to consolidate the arbitration between the shipowner and the guarantor with the arbitration between the shipowner and the charterer and make the necessary adjustment concerning the selection of the arbitrators?

527 F.2d at 968.

Holding first that Compania Espanola had agreed to arbitrate, the court went on to state that "there is more than ample support in the case law for the propriety of a court's consolidation of arbitrations under the federal statute." 527 F.2d at 975 (citations omitted). The court rejected the owner's twin contentions that the district court had no power to consolidate the arbitrations

and that even if the court did have the power to consolidate, it could not do so unless the party common to the two arbitration agreements consented to consolidation. Further, the court saw no merit in the owner's claim that it would be prejudiced by consolidation of the arbitrations. Instead, the court said "[t]hat the consolidation was in the interest of justice is overwhelmingly demonstrated. There were not only common questions of law and fact in the two arbitrations but there was danger of conflicting findings . . . ." 527 F.2d at 974. Finally, the court stated that "the liberal purposes of the Federal Arbitration Act clearly require that this act be interpreted so as to permit and even to encourage the consolidation of arbitration proceedings in proper cases . . . ." 527 F.2d at 975.[7]

Compania Espanola unequivocally holds that federal courts have authority to order consolidation and relies on no issue of consent to consolidate. The sole question of consent in the case was whether the guarantor had agreed to arbitrate, or as the court put it, "whether [the] guarantor is bound by an arbitration clause contained in the original contract . . . ." 527 F.2d at 973. This is made even more clear if one examines, in various portions of the opinion, the manner in which the court

---

[7] The Second Circuit went on to explain, "if this flexible and desirable remedy is to encompass consolidation, we hold this must include the essential implementation of the consolidated proceeding by moulding the method of selection and the number of arbitrators so as to fit this new situation. *New situations require new remedies.* To adhere to the terms of the original arbitration agreement which contemplated the appointment of a single arbitrator by each participant and selection by them of a third arbitrator is no longer possible. . . ." 527 F.2d at 975 (emphasis added). This language hardly sounds in consent! What the Court of Appeals did, modifying the District Court's order, was to allow each of the three parties to appoint an arbitrator and then have those three unanimously select two more—making a total of five. *Id.*

characterizes or phrases the consent issue.[8] There is not a single word in the Second Circuit's opinion (or the underlying arbitration clause) about consent to consolidate, as opposed to consent to arbitrate.

In the instant case, there is no question that both parties agreed to arbitrate with Weyerhaeuser. The only issue here, as in *Compania Espanola*, is whether a federal court has authority under the Arbitration Act to consolidate two arbitrations that will involve common questions of law and fact. *See Compania Espanola*, 527 F.2d at 974-75. As noted above, the *Compania Espanola* court answered this inquiry in the affirmative.

To the extent the question of consent to consolidate was raised in *Compania Espanola* by Nereus, the shipowner, it is irrelevant here for several reasons. First, Nereus contended that, *assuming* a federal court has authority to consolidate two arbitrations, consolidation is not proper "unless the party who has arbitration agreements with the other two parties consents to that procedure." *Id.* Thus, the issue of consent, as raised by Nereus in *Compania Espanola*, *presupposed* that a federal court has authority to order consolidation. In the instant case, the lower courts ended their analyses before reaching this point because they held that a federal court has no authority to order consolidation. Second, the Court of Appeals in *Compania Espanola* rejected or at least ignored Nereus' contention that its consent to consolidate was required before consolidation could be ordered because it made no express finding that Nereus

---

[8] *E.g.*, "Did the guarantor agree to arbitrate," 527 F.2d at 968; "[The guarantor] claimed it had not agreed to arbitrate," 527 F.2d at 970; "We think all that [the district judge] decided . . . was that [the guarantor] had agreed to arbitrate," 527 F.2d at 971; "[W]e affirm [the district judge's] holding that [the guarantor] is obliged to arbitrate . . .," 527 F.2d at 973.

had consented to consolidate, yet it affirmed the District Court's order mandating consolidation.[9]

For these reasons, the Ninth Circuit's attempts to distinguish *Compania Espanola* are not well-reasoned. The court's opinion totally ignores the Second Circuit's appropriate concern about "the interests of justice" and the "danger of conflicting findings." The Court of Appeals' holding here can only be characterized as squarely contrary to *Compania Espanola*'s holding that a federal court can, in appropriate circumstances, order consolidation of two arbitrations. Therefore, resolution of the question here is required by this Court. *Cleveland Board of Education v. La Fleur*, 414 U.S. 632, 638 (1974).

II. The Question Presented Here Involves A Recurrent Situation In Maritime Practice And Hence The Confusion Caused By The Decision Below Will Be Particularly Disruptive.

A. The Issue Here Is a Recurring One in the Maritime Industry and in the Federal Courts.

The need for Supreme Court resolution of the clear conflict between the Ninth and Second Circuits is enhanced because the issue here has arisen many times in the past and is bound to be a recurring question in the federal courts. The inclusion of an arbitration clause in charter parties and subcharters is a "standard" practice. *Weyerhaeuser Co. v. Western Seas Shipping Co.*, 568 F. Supp. 1220, 1221 (N.D. Cal. 1983), Appendix at A-7. In fact, the arbitration clause at issue here is part of the New York Produce Exchange form, Appendix at A-26, and is the "dominate" contract used in the time charter market. M. Wilford, T. Coghlin, N.

---

[9] In fact, at least one court has subsequently read *Compania Espanola* as holding that a federal court may order consolidation of arbitrations over the objection of one of the disputants. *Brownko Int'l, Inc. v. Ogden Steel Co.*, 585 F. Supp. 1432, 1437 (S.D.N.Y. 1983).

Healy, Jr. & J. Kimball, *Time Charters* at v (2d ed. 1982).[10] Moreover, many of the disputes that arise in the context of such maritime transactions involve more than two parties. *See, e.g.*, cases cited in *Compania Espanola*, 527 F.2d at 973. Because arbitration clauses are a standard accouterment of multiple party charter agreements such as is involved here, G. Gilmore & C. Black, Jr., *The Law of Admiralty* 196 (2d ed. 1975), the question of whether a federal court can order consolidation of arbitrations often arises in maritime cases in federal courts.[11] Thus, this question, which is not limited to maritime cases,[12] is likely to arise again repeatedly in the future. It therefore especially requires Supreme Court guidance for the lower federal courts. *Maryland v. United States*, 381 U.S. 41, 43, *vacated on other grounds*, 382 U.S. 159 (1965); *Massachusetts Trustees v. United States*, 377 U.S. 235, 237 (1964).

---

[10] Indeed, the form is common enough to be reproduced in a leading admiralty text. *See* G. Gilmore & C. Black, Jr., *The Law of Admiralty* 1003, Appendix B (2d ed. 1975).

[11] In all of the reported decisions involving common questions of law and fact, the courts have ordered consolidation. *See, e.g., In re Voest-Alpine Int'l, Inc. v. Supreme Maritime Ltd.*, 1982 A.M.C. 921, 922 (S.D.N.Y. 1982); *In re General Navigation, Inc. v. Sameit Dea Brovig*, 1981 A.M.C. 1781, 1783 (S.D.N.Y. 1981); *Maritime Trading Ltd. v. Ore Int'l Corp.*, 432 F. Supp. 683, 684 (S.D.N.Y. 1977); *In re Czarnikow-Rionda Co. v. Eddie Steamship Co.*, 1975 A.M.C. 1116, 1119 (S.D.N.Y. 1972); *Lavino Shipping Co. v. Santa Cecilia Co., S.A.*, 1972 A.M.C. 2454, 2455 (S.D.N.Y. 1972); *Chilean Nitrate & Iodine Sales v. Intermarine Corp.*, 1972 A.M.C. 2460, 2461 (S.D.N.Y. 1971). *But see Showa Shipping Co. v. A/B Bellis*, 1972 A.M.C. 2458, 2459 (S.D.N.Y. 1972) (consolidation denied where there existed "widely differ[ent]" issues of fact in the two arbitrations).

[12] *See, e.g., Huber, Hunt & Nichols, Inc. v. Architectural Stone Co.*, 625 F.2d 22, 26 n. 11 (5th Cir. 1980) (court notes in dictum that consolidation of arbitrations seems advantageous); *Gavlik Const. Co. v. H.F. Campbell Co.*, 526 F.2d 777, 789 n. 28 (3d Cir. 1975) (because lower court failed to make finding of whether

B. The Effects of the Decision Below on the Maritime Industry

The decision below and the conflict it creates with established Second Circuit practice will create confusion and uncertainty in the substantial maritime industry. Parties who enter into future charters and subcharters will be uncertain as to whether any common procedure of the Federal Rules (such as consolidation) can be used in resolving a dispute, unless the procedure is explicitly provided for in the arbitration clause. Clearly, it makes no commercial sense to have separate rules in federal courts on the east and west coasts regarding consolidation of arbitrations. As a result of the Ninth Circuit's opinion, the convenience of the parties may be of secondary importance when the situs of an arbitration is negotiated.

A very large volume of maritime commerce is subject to the long-used New York Produce Exchange time charter form, Appendix at A-26, and the arbitration clause it contains, Appendix at A-32. Neither this clause nor other similar arbitration clauses explicitly provide for consolidation of arbitrations. Thus, parties to *existing* charters are locked into uncertainty. Maritime charters are often long-term events, G. Gilmore & C. Black, Jr., *The Law of Admiralty* 229 (2d ed. 1975), and thus the uncertainty created by the Ninth Circuit may have continuing effects for many years. Moreover, many of those who are parties to existing charter agreements have relied upon the state of the law as it existed prior to the decision here, and this reliance helped form the parties'

---

contract involved "commerce" under 9 U.S.C. § 3, court could not decide question of consolidation under federal law); *Brownko Int'l, Inc. v. Ogden Steel Co.*, 585 F. Supp. 1432, 1437 (S.D.N.Y. 1983) (consolidation may be ordered even over objection of one of the parties); *Robinson v. Warner*, 370 F. Supp. 828, 831 (D.R.I. 1974).

legitimate contractual expectations.[13] The dramatic change in the law worked by the Ninth Circuit's decision here has diametrically altered these expectations. Thus, the court's decision affects far more parties than merely the disputants here.

What is even worse, the Ninth Circuit's decision, as discussed in greater detail *infra* pp. 17 to 21, will lessen the utility of arbitration in the maritime industry. Because the arbitration process without the clear benefits of consolidation[14] will become more costly and time-consuming, it will become less effective as a means of dispute resolution in an industry in which disputes are common and the need for their expeditious resolution is great.[15] Not only will this denigration of the arbitration process alter the established practice in the maritime industry, it will lead to higher costs and inefficiencies and will increase the burdens upon interstate and international maritime commerce as well. This latter result is completely at odds with the federal government's role in fostering and protecting international

---

[13] *See, e.g.*, cases cited *supra* note 11; *see also Award Service of the Society of Maritime Arbitrators* (published by the Society of Maritime Arbitrators, Inc. (1975-83)) (at least 47 reported final decisions in arbitrations involving owner-charterer-subcharterer conflicts have, in the last nine years, been consolidated in New York, and many more consolidated arbitrations are pending there). Appendix at A-38. In fact, the Ninth Circuit's decision in this case created great surprise on the part of maritime lawyers in New York, the largest maritime jurisdiction in the country. *See The Journal of Commerce* (New York), July 17, 1984, at 3B, col. 6.

[14] Fed. R. Civ. P. 42(a) enables courts to consolidate matters before them so that matters may be "dispatched with expedition and economy while providing justice to the parties." 9 C. Wright & A. Miller, *Federal Practice and Procedure: Civil* § 2381 (1971).

[15] Indeed, in cases involving time charters in which the charterer must make use of the vessel in a contractually limited period of time, the need for expeditious resolution of disputes is highly important. If, as in this case, a dispute arises regarding operation of a ship, valuable portions of the charter period may be lost while the dispute is settled.

maritime commerce. U.S. Const., art. I, § 8, Cl. 3; *The Daniel Ball*, 77 U.S. (10 Wall.) 557, 564 (1871). Accordingly, the importance of the issue decided by the court below calls for Supreme Court review.

C. The Need for A Uniform Rule

The issue presented here is akin to a procedural question. Rule 81(a)(3) of the Federal Rules of Civil Procedure states that in proceedings under the United States Arbitration Act, the Federal Rules of Civil Procedure "apply only to the extent that matters of procedure are not provided for" in the Act. Rule 42(a) provides for consolidation of proceedings and, because the Arbitration Act is silent on the issue of consolidation, would permit the relief sought by Weyerhaeuser here (*i.e.* consolidation). *Compania Espanola*, 527 F.2d at 975. Just as this Court recognized, for example in *Hanna v. Plumer*, 380 U.S. 460 (1965), the need for uniform rules of federal procedure, the need exists here for a uniform rule governing whether a federal court may order consolidation of arbitration proceedings by way of Fed. R. Civ. P. 81(a)(3) and 42(a). This is especially true in the instant case because "[t]he law of charters is . . . federal law, as to which uniformity is required." G. Gilmore & C. Black, Jr., *The Law of Admiralty* 196 (2d ed. 1975). Accordingly, this is a case in which Supreme Court review is particularly desirable. *Hanna*, 380 U.S. at 463 (Court reviewed decision of lower court because of the threat it posed to "the goal of uniformity of federal procedure").

III. The Ninth Circuit's Decision Has Artificially Constrained The Arbitration Process; It Will Tend To Discourage The Use of Arbitration, To The Detriment Of Both Disputants And The Federal Courts.

The Ninth Circuit's decision does violence to the purposes of the United States Arbitration Act and will undermine the utility generally of the arbitration proc-

ess. Accordingly, the decision involves an important question of federal law which the Court should consider.

The very purpose of the Arbitration Act was to provide to parties in a commercial context an alternative forum for inexpensive and expedient dispute resolution. *Diapulse Corp. v. Carba, Ltd.*, 626 F.2d 1108, 1110 (2d Cir. 1980). The legislative history of the act stresses the intent of Congress to enhance the utility of arbitration as a vehicle by which parties could avoid the "delay and cost of litigation." H.R. Rep. No. 96, 68th Cong., 1st Sess. 2 (1924). Even though civil dockets were much less crowded at the time of the Act's passage than they are now, Congress was still concerned about the "agitation against the costliness and delays of litigation." *Id.* It was thought that the statute would benefit not only those who utilized arbitration but other litigants and the courts as well, for it was hoped that caseloads in the courts would be reduced.

Another concern raised by proponents of the Act was that the costs and delays of dispute resolution would dramatically increase the costs of doing business and would eventually result in higher prices for the consumers of goods. *Arbitration of Interstate Commercial Disputes: Joint Hearings on S. 1005 and H.R. 646 Before the Subcomms. of the Comms. on the Judiciary*, 68th Cong., 1st Sess. 7 (1924) (statement of Charles L. Bernheimer, Chairman, Committee on Arbitration, Chamber of Commerce of the State of New York). It is difficult to imagine an industry in which the objective of curtailing the costs of dispute resolution would be as important as it is with respect to the maritime industry, for the costs of all goods that are transported by ship are affected.

Ironically, the Ninth Circuit's decision in this case will have the effect of directly undermining the purposes of the Arbitration Act by adding to the arbitration process some of the very costs and delays that Congress was try-

ing to eliminate from the dispute resolution process. By withdrawing from federal courts the authority to consolidate arbitrations involving common questions of law and fact, the decision limits the use in arbitration of one of the commonly used means of streamlining litigation in the courts. As one court noted in commenting upon Fed. R. Civ. P. 42(a):

> [C]onsolidation . . . serve[s] the purpose of avoiding needless duplication of time, effort and expense on the part of the parties and the court. . . . It . . . also enable[s] the proceedings to be expedited and make[s] for economy and convenience generally in the administration of . . . litigation.

Fields v. Wolfson, 41 F.R.D. 329, 330 (S.D.N.Y. 1967). Parties confronted with the possibility, created by the opinion below, that arbitration may be a costly, protracted, duplicative process will be less inclined to agree to or utilize arbitration.[16] Even if they do utilize arbitration, the costs and delays involved will disrupt the parties' business operations. Finally, a party in the position of Weyerhaeuser, a mere middleman in the transaction at issue here, will be loathe to agree to arbitration because of the risk it may face of inconsistent awards.[17]

---

[16] Parties also may become disinclined to use arbitration if consolidation is not available because one likely scenario is that a party will be forced to defend a claim or position about which it has no knowledge. In the instant case, the Owners have controlled the operation of the PACDUKE and PACDUCHESS and possess all the direct knowledge and information relating to the claim of Karlander against Weyerhaeuser; Weyerhaeuser is in no position to defend against this claim. *See Compania Espanola*, 527 F.2d at 970. The law of admiralty has long recognized that one without knowledge or information concerning a claim should not be saddled with the burden borne by the party in possession of that knowledge or information. *See* G. Gilmore & C. Black, Jr., *The Law of Admiralty* 141 (2d ed. 1975).

[17] To use Weyerhaeuser's situation as an example, suppose that in a Weyerhaeuser-Karlander arbitration the stowage restrictions,

For all these reasons, the decision of the Ninth Circuit makes arbitration a substantially less attractive alternative to litigation and will discourage the use of arbitration.

The effects that will be visited upon disputants and the federal courts as a result of the inefficiencies wrought upon the arbitration process by the Court of Appeals' decision will be both substantial and antithetical to the orderly administration of justice. The primary effect, of course, as discussed above, will be to burden the arbitration process itself, because it will become costlier, more protracted, and will pose the risk of inconsistent awards for certain parties in multi-party transactions. However, an even more far-reaching ripple effect of the decision will be to congest the civil dockets of the courts. As parties become less willing to arbitrate, they will become more willing to litigate.[18] Additionally, to the extent there are two arbitration awards produced from a given transaction (instead of one consolidated award), the chances of one of the parties' bringing an action in federal court to enforce an award, 9 U.S.C. § 9, to vacate an award, 9 U.S.C. § 10, or to modify an award, 9 U.S.C. § 11, are doubled. As a result, the expressed purposes of the Arbitration Act—providing disputants an inexpensive

---

which are at the core of the dispute here, are found unreasonable. Suppose further that in a subsequent Weyerhaeuser-Owners arbitration—in which the result of the first arbitration would not be binding—the restrictions are found reasonable. Weyerhaeuser would thus be subject to inconsistent awards and would have no recourse. *See Compania Espanola*, 527 F.2d at 970, 974 ("[without consolidation] there was [the] danger of conflicting findings."). It would be liable to Karlander, yet would have no indemnity rights against the Owners, even though the Owners' restrictions are the only reason or basis for Weyerhaeuser's potential liability.

[18] Because so many arbitrations concern maritime disputes, *see supra* pp. 13-17, the increased caseloads will be felt particularly in the federal courts. *See* 28 U.S.C. § 1333(1) (1982).

and expeditious way to resolve their disagreements and relieving the courts of their backlogs—will be directly undermined by the Ninth Circuit's decision. Accordingly, the issue of whether a federal court can order consolidation of arbitrations is an important question of federal law which is appropriate for review by this Court.

CONCLUSION

The decision of the Ninth Circuit creates a conflict between two circuits of the Court of Appeals on an issue that is critical to the orderly administration of justice in the United States and of great importance to a major industry. Weyerhaeuser is seeking a fair and expeditious resolution of the expensive dispute that gave rise to the instant case. Weyerhaeuser, in fact, is nothing more than a "middleman" here in a dispute between Karlander and the Owners. Incongruously, however, if the arbitrations between the parties are not consolidated, Weyerhaeuser faces the risk of inconsistent arbitration awards and potential liability in excess of $30,000,000.

For all these reasons, the petition for certiorari should be granted.

Respectfully submitted,

Of Counsel:
JOHN M. ANDERSON
AMY SLATER
LANDELS, RIPLEY & DIAMOND
450 Pacific Avenue
San Francisco, CA 94133

RICHARD H. SOMMER
WILLIAM XANTTOPOULOS
ARTHUR E. HOFFMANN, JR.
KIRLIN, CAMPBELL & KEATING
120 Broadway
New York, NY 10271

DONALD I. BAKER
Counsel of Record
JOHN R. MUNICH
SUTHERLAND, ASBILL & BRENNAN
1666 K Street, N.W., Suite 800
Washington, D.C. 20006
(202) 872-7800
Counsel for Petitioner

APPENDICES

APPENDIX

		Page
1.	Opinion of the Court of Appeals	A-1
2.	Order Denying Petition for Rehearing	A-6
3.	Opinion and Order of the District Court	A-7
4.	Judgment of the District Court	A-12
5.	Statutory Provisions and Rules of Procedure Involved	A-13
6.	New York Produce Exchange Time Charter Form	A-26
7.	Decisions Rendered in Consolidated Arbitration Proceedings	A-38

APPENDIX 1

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 83-2411

DC No. C 83-3159-WWS

WEYERHAEUSER COMPANY,
Petitioner-Appellant,

v.

WESTERN SEAS SHIPPING CO.,
EASTERN SEAS SHIPPING CO., and
KARLANDER (AUSTRALIA) PTY. LTD.,
Respondent-Appellee.

Appeal from the United States District Court
for the Northern District of California

Hon. William W. Schwarzer, U.S. District Judge,
Presiding

Argued and Submitted April 10, 1984

[Filed Jun. 22, 1984]

OPINION

Before: WALLACE, SKOPIL, and NORRIS, Circuit Judges.

NORRIS, Circuit Judge:

Appellant Weyerhaeuser Company (Weyerhaeuser) appeals the district court's denial of its petition to com-

pel the consolidation of two maritime arbitrations into a single arbitration before five arbitrators.

I

Appellee Trans-Pacific Shipping Co.* (Trans-Pacific) owns two ships that were time chartered by Weyerhaeuser. Weyerhaeuser subsequently subchartered the ships to appellee Karlander Australia Party Ltd. (Karlander). During the pendency of the subcharter, a dispute arose concerning cargo stowage restrictions.

Under the standard arbitration clause in the subcharter, Karlander demanded arbitration with Weyerhaeuser before a board of three commercial arbitrators over the losses it claims to have suffered as a result of Weyerhaeuser's allegedly unreasonable refusals to permit underdeck container stowage. Subsequently, under an identical clause in the headcharter, Weyerhaeuser demanded arbitration before three arbitrators with Trans-Pacific over Weyerhaeuser's right to indemnity from Trans-Pacific for any losses that Karlander may recover in its arbitration.

Weyerhaeuser petitioned the district court to compel consolidation of the two arbitrations into a single arbitration before five arbitrators. Both Trans-Pacific and Karlander opposed the petition to compel consolidated arbitration. The district court denied the petition, and Weyerhaeuser appealed. We have jurisdiction of Weyerhaeuser's appeal under 28 U.S.C. § 1291.

II

Weyerhaeuser asserts that this Court has the power to compel consolidation under the United States Arbitration Act, 9 U.S.C. §§ 1-14, and under Fed. R. Civ. P. 81(a)

---

* Trans-Pacific Shipping Co. is the successor in interest to Western Seas Shipping Co. and Eastern Seas Shipping Co.

(3) and 42(a). The principal authority relied upon by Weyerhaeuser for this proposition is *Compania Espanola de Petroleos, S.A. v. Nereus Shipping, S.A.*, 527 F.2d 966 (2d Cir. 1975), *cert. denied*, 426 U.S. 936 (1976).

Compania Espanola involved an appeal from a district court order consolidating two arbitration proceedings—one between the owner of a ship and the ship's charterer and one between the owner and the charterer's guarantor. The Second Circuit affirmed the district court order, relying on two grounds. First, the court held that all three parties had consented to consolidation. All three had signed an addendum to the original charter party to the effect that the guarantor would undertake all the charterer's duties in the event of the charterer's default. The court held that since the original charter party imposed a duty to arbitrate, the addendum amounted to implicit consent to joint arbitration in the event of a dispute. *Id.* at 973-74. Second, the Second Circuit stated that "the liberal purposes of the Federal Arbitration Act clearly require that this act be interpreted so as to permit and even to encourage the consolidation of arbitration proceedings in proper cases. . . ." *Id.* at 975 (footnote omitted). The court held that under Fed. R. Civ. P. 42(a), two arbitrations presenting common questions of law and fact constituted a "proper case." *Id.* at 968.

Insofar as *Companis Espanola* rests on the consent of the parties, it is distinguishable from the present case. It is clear that the parties here did not consent to joint arbitration. As Weyerhaeuser admits, there are two separate agreements between the headcharter and subcharter parties. Each agreement contains its own arbitration clause and each clause requires only arbitration between the parties to the agreement. In fact, Trans-Pacific specifically secured an addendum to its agreement with Weyerhaeuser insulating Trans-Pacific from any increase in its obligations by reason of any subcharter Weyerhaeuser might execute. Weyerhaeuser agreed to

indemnify and hold "owners harmless from and against all losses, costs, risks or expenses of any nature whatsoever suffered by owners during such sublet, which would not have been otherwise incurred by owners had the vessels not been sublet to Karlander . . . ."

Insofar as *Compania* holds that federal courts may order consolidation in the absence of consent, we decline to follow it. Instead, we adopt the reasoning of the district court in this case. The district court correctly held that our authority under the United States Arbitration Act is narrowly circumscribed. The Act states in pertinent part:

> The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or failure to comply therewith is not in issue, the court shall make an order directing the parties *to proceed to arbitration in accordance with the terms of the arbitration agreement* . . . . If the making of the agreement or the failure, neglect, or refusal to perform the same be in issue, the court shall proceed summarily to the trial thereof . . . . If the [factfinder] find[s] that no agreement in writing for arbitration was made or there is no default in proceeding thereunder, the proceeding shall be dismissed. If the [factfinder] find[s] that an agreement for arbitration was made in writing and that there is a default in proceeding thereunder, the court shall make an order summarily directing the parties *to proceed with the arbitration in accordance with the terms thereof.*

9 U.S.C. § 4 (emphasis added). Thus, we can only determine whether a written arbitration agreement exists, and if it does, enforce it "in accordance with its terms." As the district court noted, this provision "comports with the statute's underlying premise that arbitration is a creature of contract, and that '[a]n agreement to arbi-

trate before a special tribunal is, in effect, a specialized kind of forum-selection clause that posits not only the situs of suit but also the procedure to be used in resolving the dispute.' *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 519 (1974)."

Thus, the only issue properly before this Court is whether Weyerhaeuser, Karlander, and Trans-Pacific are parties to a written agreement providing for consolidated arbitration. As already indicated, they are not. Consequently, the decision of the district court must be affirmed.

AFFIRMED.

APPENDIX 2

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 83-2411

WEYERHAEUSER COMPANY,
Appellant,

vs.

WESTERN SEAS SHIPPING CO.,
EASTERN SEAS SHIPPING CO., and
KARLANDER (AUSTRALIA) PTY. LTD.,
Appellees.

ORDER

[Filed Aug. 16, 1984]

Before: WALLACE, SKOPIL and NORRIS, Circuit Judges.

The panel as constituted above has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is DENIED, and the suggestion for rehearing en banc is REJECTED.

APPENDIX 3

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

No. C-83-3159-WWS

WEYERHAEUSER COMPANY,
Plaintiff,

v.

WESTERN SEAS SHIPPING CO., *et al.*,
Defendants.

OPINION

[Filed Aug. 22, 1983]

Respondent Trans-Pacific Shipping Co. (successor in interest to nominal respondents Eastern Seas and Western Seas) owns two ships that were time chartered by Petitioner Weyerhaeuser in 1974. Weyerhaeuser subsequently subchartered the ships to Respondent Karlander Australia Party Ltd. Disputes later arose concerning Karlander's actual or proposed use of the ships. Apparently, Weyerhaeuser refused Karlander permission to carry certain cargoes, claiming that Trans-Pacific's predecessors were forcing it to do so.

Under the standard arbitration clause in the subcharter, Karlander has demanded arbitration with Weyerhaeuser before a board of three commercial arbitrators over the losses it claims to have suffered as a result of Weyerhaeuser's allegedly unreasonable re-

fusals of permission. In turn, Weyerhaeuser has demanded, under an identical clause in the headcharter, arbitration before three arbitrators with Trans-Pacific over Weyerhaeuser's right to indemnity from Trans-Pacific for any losses that Karlander may recover in its arbitration. Weyerhaeuser now petitions this Court to compel consolidation of the two arbitrations into a single arbitration before five arbitrators. Both Trans-Pacific and Karlander are unwilling to consent to such a proceeding, preferring instead to pursue their bilateral arbitrations with Weyerhaeuser individually.

Weyerhaeuser asserts that this Court has the power to compel consolidation under the United States Arbitration Act, 9 U.S.C. §§ 1-14, and Fed. R. Civ. P. 81(a)(3) and 42(a). Rule 81(a)(3) provides that "[i]n proceedings under Title 9, U.S.C., relating to arbitration . . . [the federal] rules apply only to the extent that matters of procedure are not provided for in those statutes." Weyerhaeuser argues that since the Arbitration Act is silent on the subject of consolidation of arbitrations, Rule 42(a) governs the issue, and that since these arbitrations share substantial "common questions of law or fact," the Court should order them consolidated. Weyerhaeuser cites several cases in which federal courts have ordered consolidation of arbitrations.

Examination of these cases and the relevant statute shows Weyerhaeuser's argument not to be well founded. 9 U.S.C. § 4 provides in relevant part:

> The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties *to proceed to arbitration in accordance with the terms of the agreement.* . . . If the making of the agreement or the failure, neglect, or refusal to perform the same be in issue, the court shall proceed summarily to the trial thereof. . . . If the [fact-

> finder] find that no agreement in writing for arbitration was made or that there is no default in proceeding thereunder, the proceeding shall be dismissed. If the [factfinder] find that an agreement for arbitration was made in writing and that there is a default in proceeding thereunder, the court shall make an order summarily directing the parties *to proceed with the arbitration in accordance with the terms thereof.* (emphasis added)

The statute grants the Court the authority only to determine whether a written arbitration agreement exists, and if it does, to enforce it "in accordance with its terms." This provision comports with the statute's underlying premise that arbitration is a creature of contract, and that "[a]n agreement to arbitrate before a specified tribunal is, in effect, a specialized kind of forum-selection clause that posits not only the situs of suit but also the procedure to be used in resolving the dispute." *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 519 (1974). Weyerhaeuser's argument, that consolidation would not force respondents to arbitrate disputes they had not agreed to arbitrate since consolidation does not eradicate the identity of the individual matters consolidated, misses the point. The agreement to arbitrate only certain disputes or only in a certain manner represents a contractual allocation of risk that the Court may not disturb absent the kind of showing required for reformation of an ordinary contract. *See* 9 U.S.C. § 2. The standards for consolidation under Rule 42(a) are therefore irrelevant. The sole issue cognizable by this Court is whether Karlander and Trans-Pacific are parties to a written agreement providing for consolidated arbitration before five arbitrators. As will appear below, they are not.

The Second Circuit reached a different conclusion regarding the scope of the District Court's authority in

Compania Espanola de Petroleos, S.A. v. Nereus Shipping, S.A., 527 F.2d 966 (2d Cir. 1975). That case involved the owner and charterer of a ship, and the charterer's guarantor. The District Court ordered consolidation of the arbitrations between the owner and charterer on the one hand, and the owner and guarantor on the other. The Court of Appeals affirmed on the explicit ground that all three parties had signed an addendum to the original charter party, which contained an arbitration clause, to the effect that the guarantor would undertake all the charterer's duties under the charter party in the event of the charterer's default. Thus the owner had obligated itself to arbitrate jointly with charterer and guarantor in the event of a dispute. The Court of Appeals went on to distinguish cases where arbitrations had not been consolidated on the ground that the parties in those cases had not similarly bound themselves. *Id.* at 973-74.

It must be noted that the court also relied on the District Court's asserted power to consolidate under Rules 81(a)(3) and 42(a) even without contractual agreement among the parties, citing *Robinson v. Warner*, 370 F. Supp. 626 (S.D.N.Y. 1972); *Lavino Shipping Co. v. Santa Cecilia Co.*, 1972 A.M.C. 2454 (S.D.N.Y. 1972); *In re Arbitration between Chilean Nitrate & Iodine Sales etc. and Intermarine Corp.*, 1972 A.M.C. 2460 (S.D.N.Y. 1971). These cases ignore the limitation on the authority granted the District Court under the federal Arbitration Act. See p. 3, *supra*. Indeed, they rely on cases applying *state* law, *see, e.g., Robinson, supra*, 370 F. Supp. at 829-30, or assert that consolidation is a purely discretionary matter, *see In re Arbitration between Czarnikow-Rionda Co. and Eddie Steamship Co.*, 1975 A.M.C. 1116, 1119 (S.D.N.Y. 1975); *Insco Lines, Ltd. v. Cypromar Nav. Co.*, 1975 A.M.C. 2233, 2235 (S.D.N.Y. 1975); *Lavino Shipping, supra*, 1972 A.M.C. at 2456. The several cases since *Compania*

Espanola, all from the Southern District of New York, have adopted its broader dictum without comment. *See In re Arbitration between Voest-Alpine Int'l, Inc. and Supreme Maritime Ltd.*, 1982 A.M.C. 921 (S.D.N.Y. 1982); *In re Application of General Nav., Inc. v. Sameit Dea Brovig*, 1981 A.M.C. 1781 (S.D.N.Y. 1981); *In re Consolidated Arbitration between Marine Trading, Ltd. and Ore Int'l Corp.*, 432 F. Supp. 683 (S.D.N.Y. 1977).

Insofar as those decisions find authority in Rules 81 (a)(3) and 42(a) to order consolidated arbitration in the absence of consent by the parties, the Court is in disagreement with them for the reason stated. *Compania Espanola* itself is distinguishable inasmuch as there the agreement could be (and was) interpreted as implying consent to joint arbitration. Trans-Pacific's predecessors have never consented to joint arbitration or arbitration before five arbitrators. Moreover, they specifically secured an addendum agreement with Weyerhaeuser insulating them from any increase in their obligations by reason of any subcharter Weyerhaeuser might execute. Thus to order joint arbitration among the three parties would directly contravene their clearly expressed understanding. In view of the grant of authority under § 4 limiting this Court to enforcing arbitration agreements according to their terms, the petition to compel consolidated arbitration must be denied.

IT IS SO ORDERED.

DATED: August 19, 1983

/s/ William W. Schwarzer
WILLIAM W. SCHWARZER
United States District Judge

APPENDIX 4

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

No. C-83-3159-WWS

WEYERHAEUSER COMPANY,
Plaintiff,

v.

WESTERN SEAS SHIPPING CO., *et al.*,
Defendants.

JUDGEMENT

[Filed Sept. 9, 1983]

This Court having been petitioned to consolidate two arbitrations, and having determined it is without authority to do so,

IT IS HEREBY ORDERED AND ADJUDGED that the petition be and hereby is DENIED.

DATED: September 9, 1983

/s/ William W. Schwarzer
WILLIAM W. SCHWARZER
United States District Judge

APPENDIX 5

STATUTORY PROVISIONS AND RULES OF PROCEDURE

UNITED STATES ARBITRATION ACT, 9 U.S.C. §§ 1-14 (1982)

§ 1. "Maritime transactions" and "Commerce" defined; exceptions to operation of title

"Maritime transactions", as herein defined, means charter parties, bills of lading of water carriers, agreements relating to wharfage, supplies furnished vessels or repairs to vessels, collisions, or any other matters in foreign commerce which, if the subject of controversy, would be embraced within admiralty jurisdiction; "commerce", as herein defined, means commerce among the several States or with foreign nations, or in any Territory of the United States or in the District of Columbia, or between any such Territory and another, or between any such Territory and any State or foreign nation, or between the District of Columbia and any State or Territory or foreign nation, but nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce.

(July 30, 1947, ch. 392, 61 Stat. 670.)

§ 2. Validity, irrevocability, and enforcement of agreements to arbitrate

A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal,

shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

(July 30, 1947, ch. 392, 61 Stat. 670.)

§ 3. Stay of proceedings where issue therein referable to arbitration

If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration.

(July 30, 1947, ch. 392, 61 Stat. 670.)

§ 4. Failure to arbitrate under agreement; petition to United States court having jurisdiction for order to compel arbitration; notice and service thereof; hearing and determination

A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court which, save for such agreement, would have jurisdiction under title 28, in a civil action or in admiralty of the subject matter of a suit arising out of the controversy between the parties, for an order directing that such arbitration proceed in the manner provided for in such agreement. Five days' notice in writing of such application shall be served upon the party in default. Service thereof shall be made in the manner provided by the Federal Rules of Civil Procedure. The court shall

hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement. The hearing and proceedings, under such agreement, shall be within the district in which the petition for an order directing such arbitration is filed. If the making of the arbitration agreement or the failure, neglect, or refusal to perform the same be in issue, the court shall proceed summarily to the trial thereof. If no jury trial be demanded by the party alleged to be in default, or if the matter in dispute is within admiralty jurisdiction, the court shall hear and determine such issue. Where such an issue is raised, the party alleged to be in default may, except in cases of admiralty, on or before the return day of the notice of application, demand a jury trial of such issue, and upon such demand the court shall make an order referring the issue or issues to a jury in the manner provided by the Federal Rules of Civil Procedure, or may specially call a jury for that purpose. If the jury find that no agreement in writing for arbitration was made or that there is no default in proceeding thereunder, the proceeding shall be dismissed. If the jury find that an agreement for arbitration was made in writing and that there is a default in proceeding thereunder, the court shall make an order summarily directing the parties to proceed with the arbitration in accordance with the terms thereof.

(July 30, 1947, ch. 392, 61 Stat. 671; Sept. 3, 1954, ch. 1263, § 19, 68 Stat. 1233.)

§ 5. Appointment of arbitrators or umpire

If in the agreement provision be made for a method of naming or appointing an arbitrator or arbitrators or an umpire, such method shall be followed; but if no method be provided therein, or if a method be provided and any

party thereto shall fail to avail himself of such method, or if for any other reason there shall be a lapse in the naming of an arbitrator or arbitrators or umpire, or in filling a vacancy, then upon the application of either party to the controversy the court shall designate and appoint an arbitrator or arbitrators or umpire, as the case may require, who shall act under the said agreement with the same force and effect as if he or they had been specifically named therein; and unless otherwise provided in the agreement the arbitration shall be by a single arbitrator.

(July 30, 1947, ch. 392, 61 Stat. 671.)

§ 6. Application heard as motion

Any application to the court hereunder shall be made and heard in the manner provided by law for the making and hearing of motions, except as otherwise herein expressly provided.

(July 30, 1947, ch. 392, 61 Stat. 671.)

§ 7. Witnesses before arbitrators; fees; compelling attendance

The arbitrators selected either as prescribed in this title or otherwise, or a majority of them, may summon in writing any person to attend before them or any of them as a witness and in a proper case to bring with him or them any book, record, document, or paper which may be deemed material as evidence in the case. The fees for such attendance shall be the same as the fees of witnesses before masters of the United States courts. Said summons shall issue in the name of the arbitrator or arbitrators, or a majority of them, and shall be signed by the arbitrators, or a majority of them, and shall be directed to the said person and shall be served in the same manner as subpoenas to appear and testify before the court; if any person or persons so summoned to tes-

tify shall refuse or neglect to obey said summons, upon petition the United States district court for the district in which such arbitrators, or a majority of them, are sitting may compel the attendance of such person or persons before said arbitrator or arbitrators, or punish said person or persons for contempt in the same manner provided by law for securing the attendance of witnesses or their punishment for neglect or refusal to attend in the courts of the United States.

(July 30, 1947, ch. 392, 61 Stat. 672; Oct. 31, 1951, ch. 655, § 14, 65 Stat. 715.)

§ 8. Proceedings begun by libel in admiralty and seizure of vessel or property

If the basis of jurisdiction be a cause of action otherwise justiciable in admiralty, then, notwithstanding anything herein to the contrary, the party claiming to be aggrieved may begin his proceeding hereunder by libel and seizure of the vessel or other property of the other party according to the usual course of admiralty proceedings, and the court shall then have jurisdiction to direct the parties to proceed with the arbitration and shall retain jurisdiction to enter its decree upon the award.

(July 30, 1947, ch. 392, 61 Stat. 672.)

§ 9. Award of arbitrators; confirmation; jurisdiction; procedure

If the parties in their agreement have agreed that a judgment of the court shall be entered upon the award made pursuant to the arbitration, and shall specify the court, then at any time within one year after the award is made any party to the arbitration may apply to the court so specified for an order confirming the award, and thereupon the court must grant such an order unless the award is vacated, modified, or corrected as prescribed

in sections 10 and 11 of this title. If no court is specified in the agreement of the parties, then such application may be made to the United States court in and for the district within which such award was made. Notice of the application shall be served upon the adverse party, and thereupon the court shall have jurisdiction of such party as though he had appeared generally in the proceeding. If the adverse party is a resident of the district within which the award was made, such service shall be made upon the adverse party or his attorney as prescribed by law for service of notice of motion in an action in the same court. If the adverse party shall be a non-resident, then the notice of the application shall be served by the marshal of any district within which the adverse party may be found in like manner as other process of the court.

(July 30, 1947, ch. 392, 61 Stat. 672.)

§ 10. Same; vacation; grounds; rehearing

In either of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration—

(a) Where the award was procured by corruption, fraud, or undue means.

(b) Where there was evident partiality or corruption in the arbitrators, or either of them.

(c) Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced.

(d) Where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

(e) Where an award is vacated and the time within which the agreement required the award to be made has not expired the court may, in its discretion, direct a rehearing by the arbitrators.

(July 30, 1947, ch. 392, 61 Stat. 672.)

§ 11. Same; modification or correction; grounds; order

In either of the following cases the United States court in and for the district wherein the award was made may make an order modifying or correcting the award upon the application of any party to the arbitration—

(a) Where there was an evident material miscalculation of figures or an evident material mistake in the description of any person, thing, or property referred to in the award.

(b) Where the arbitrators have awarded upon a matter not submitted to them, unless it is a matter not affecting the merits of the decision upon the matter submitted.

(c) Where the award is imperfect in matter of form not affecting the merits of the controversy.

The order may modify and correct the award, so as to effect the intent thereof and promote justice between the parties.

(July 30, 1947, ch. 392, 61 Stat. 673.)

§ 12. Notice of motions to vacate or modify; service; stay of proceedings

Notice of a motion to vacate, modify, or correct an award must be served upon the adverse party or his attorney within three months after the award is filed or delivered. If the adverse party is a resident of the district within which the award was made, such service shall be made upon the adverse party or his attorney as

prescribed by law for service of notice of motion in an action in the same court. If the adverse party shall be a nonresident then the notice of the application shall be served by the marshal of any district within which the adverse party may be found in like manner as other process of the court. For the purposes of the motion any judge who might make an order to stay the proceedings in an action brought in the same court may make an order, to be served with the notice of motion, staying the proceedings of the adverse party to enforce the award.

(July 30, 1947, ch. 392, 61 Stat. 673.)

§ 13. Papers filed with order on motions; judgment; docketing; force and effect; enforcement

The party moving for an order confirming, modifying, or correcting an award shall, at the time such order is filed with the clerk for the entry of judgment thereon, also file the following papers with the clerk:

(a) The agreement; the selection or appointment, if any, of an additional arbitrator or umpire; and each written extension of the time, if any, within which to make the award.

(b) The award.

(c) Each notice, affidavit, or other paper used upon an application to confirm, modify, or correct the award, and a copy of each order of the court upon such an application.

The judgment shall be docketed as if it was rendered in an action.

The judgment so entered shall have the same force and effect, in all respects, as, and be subject to all the provisions of law relating to, a judgment in an action; and

it may be enforced as if it had been rendered in an action in the court in which it is entered.

(July 30, 1947, ch. 392, 61 Stat. 673.)

§ 14. Contracts not affected

This title shall not apply to contracts made prior to January 1, 1926.

(July 30, 1947, ch. 392, 61 Stat. 673.)

FEDERAL RULES OF CIVIL PROCEDURE

Rule 42. Consolidation; Separate Trials.

(a) CONSOLIDATION. When actions involving a common question of law or fact are pending before the court, it may order a joint hearing or trial of any or all the matters in issue in the actions; it may order all the actions consolidated; and it may make such orders concerning proceedings therein as may tend to avoid unnecessary costs or delay.

(b) SEPARATE TRIALS. The court, in furtherance of convenience or to avoid prejudice, or when separate trials will be conducive to expedition and economy, may order a separate trial of any claim, cross-claim, counterclaim, or third-party claim, or of any separate issue or of any number of claims, cross-claims, counterclaims, third-party claims, or issues, always preserving inviolate the right of trial by jury as declared by the Seventh Amendment to the Constitution or as given by a statute of the United States.

Rule 81. Applicability in General.

(a) TO WHAT PROCEEDINGS APPLICABLE

(1) These rules do not apply to prize proceedings in admiralty governed by Title 10, U.S.C. §§ 7651-81. They do not apply to proceedings in bankruptcy or

proceedings in copyright under Title 17, U.S.C., except in so far as they may be made applicable thereto by rules promulgated by the Supreme Court of the United States. They do not apply to mental health proceedings in the United States District Court for the District of Columbia.

(2) These rules are applicable to proceedings for admission to citizenship, habeas corpus, and quo warranto, to the extent that the practice in such proceedings is not set forth in statutes of the United States and has heretofore conformed to the practice in civil actions. The writ of habeas corpus, or order to show cause, shall be directed to the person having custody of the person detained. It shall be returned within three days unless for good cause shown additional time is allowed which, in cases brought under 28 U.S.C. § 2254, shall not exceed forty days, and in all other cases shall not exceed twenty days.

(3) In proceedings under Title 9, U.S.C., relating to arbitration, or under the Act of May 20, 1926, ch. 347, § 9 (44 Stat. 585), U.S.C., Title 45, § 159, relating to boards of arbitration of railway labor disputes, these rules apply only to the extent that matters of procedure are not provided for in those statutes. These rules apply to proceedings to compel the giving of testimony or production of documents in accordance with a subpoena issued by an officer or agency of the United States under any statute of the United States except as otherwise provided by statute or by rules of the district court or by order of the court in the proceedings.

(4) These rules do not alter the method prescribed by the Act of February 18, 1922, c. 57, § 2 (42 Stat. 388), U.S.C., Title 7, § 292; or by the Act of June 10, 1930, c. 436, § 7 (46 Stat. 534), as amended, U.S.C., Title 7, § 499g (c), for instituting

proceedings in the United States district courts to review orders of the Secretary of Agriculture; or prescribed by the Act of June 25, 1934, c. 742, § 2 (48 Stat. 1214), U.S.C., Title 15, § 522, for instituting proceedings to review orders of the Secretary of the Interior; or prescribed by the Act of February 22, 1935, c. 18, § 5 (49 Stat. 31), U.S.C., Title 15, § 715d (c), as extended, for instituting proceedings to review orders of petroleum control boards; but the conduct of such proceedings in the district courts shall be made to conform to these rules so far as applicable.

(5) These rules do not alter the practice in the United States district courts prescribed in the Act of July 5, 1935, c. 372, §§ 9 and 10 (49 Stat. 453), as amended, U.S.C., Title 29, §§ 159 and 160, for beginning and conducting proceedings to enforce orders of the National Labor Relations Board; and in respects not covered by those statutes, the practice in the district courts shall conform to these rules so far as applicable.

(6) These rules apply to proceedings for enforcement or review of compensation orders under the Longshoremen's and Harbor Workers' Compensation Act, Act of March 4, 1927, c. 509, §§ 18, 21 (44 Stat. 1434, 1436), as amended, U.S.C., Title 33, §§ 918, 921, except to the extent that matters of procedure are provided for in that Act. The provisions for service by publication and for answer in proceedings to cancel certificates of citizenship under the Act of June 27, 1952, c. 447, Title III, c. 2, § 340 (66 Stat. 260), U.S.C., Title 8, § 1451, remain in effect.

(b) SCIRE FACIAS AND MANDAMUS. The writs of scire facias and mandamus are abolished. Relief heretofore available by mandamus or scire facias may be obtained

by appropriate action or by appropriate motion under the practice prescribed in these rules.

(c) REMOVED ACTIONS. These rules apply to civil actions removed to the United States district courts from the state courts and govern procedure after removal. Re-pleading is not necessary unless the court so orders. In a removed action in which the defendant has not answered, he shall answer or present the other defenses or objections available to him under these rules within 20 days after the receipt through service or otherwise of a copy of the initial pleading setting forth the claim for relief upon which the action or proceeding is based, or within 20 days after the service of summons upon such initial pleading, then filed, or within 5 days after the filing of the petition for removal, whichever period is longest. If at the time of removal all necessary pleadings have been served, a party entitled to trial by jury under Rule 38 shall be accorded it, if his demand therefor is served within 10 days after the petition for removal is filed if he is the petitioner, or if he is not the petitioner within 10 days after service on him of the notice of filing the petition. A party who, prior to removal, has made an express demand for trial by jury in accordance with state law, need not make a demand after removal. If state law applicable in the court from which the case is removed does not require the parties to make express demands in order to claim trial by jury, they need not make demands after removal unless the court directs that they do so within a specified time if they desire to claim trial by jury. The court may make this direction on its own motion and shall do so as a matter of course at the request of any party. The failure of a party to make demand as directed constitutes a waiver by him of trial by jury.

(d) DISTRICT OF COLUMBIA; CTS. AND JUDGES. (Abr'gtd.)

(e) LAW APPLICABLE. Whenever in these rules the law of the state in which the district court is held is made applicable, the law applied in the District of Columbia governs proceedings in the United States District Court for the District of Columbia. When the word "state" is used, it includes, if appropriate, the District of Columbia. When the term "statute of the United States" is used, it includes, so far as concerns proceedings in the United States District Court for the District of Columbia, any Act of Congress locally applicable to and in force in the District of Columbia. When the law of a state is referred to, the word "law" includes the statutes of that state and the state judicial decisions construing them.

(f) REFERENCES TO OFFICER OF THE UNITED STATES. Under any rule in which reference is made to an officer or agency of the United States, the term "officer" includes a district director of internal revenue, a former district director or collector of internal revenue, or the personal representative of a deceased district director or collector of internal revenue.

APPENDIX 6

TIME CHARTER

GOVERNMENT FORM

Approved by the New York Produce Exchange

November 6th, 1913—Amended October 20th, 1921;

August 6th, 1931; October 3rd, 1946

THIS CHARTER PARTY, made and concluded in..... day of ....., 19.... Between .... Owners of the good ..... (Steamship/Motorship) ..... of ..... of ..... tons gross register, and ..... tons net register, having engines of ..... indicated horse power and with hull, machinery and equipment in a thoroughly efficient state, and classed ..... at ..... of about ..... cubic feet bale capacity, and about ..... tons of 2240 lbs. deadweight capacity (cargo and bunkers, including fresh water and stores not exceeding one and one-half percent of ship's deadweight capacity, allowing a minimum of fifty tons) on a draft of ..... feet ..... inches on ..... Summer freeboard, inclusive of permanent bunkers, which are of the capacity of about ..... tons of fuel, and capable of steaming, fully laden, under good weather conditions about ..... knots on a consumption of about ..... tons of best Welsh coal—best grade fuel oil—best grade Diesel oil, now .... and ..... Charterers of the City of .....

WITNESSETH, That the said Owners agree to let, and the said Charterers agree to hire the said vessel, from the time of delivery, for about .... within below mentioned trading limits. Charterers to have liberty to sublet the vessel for all or any part of the time covered

by this Charter, but Charterers remaining responsible for the fulfillment of this Charter Party.

Vessel to be placed at the disposal of the Charterers, at ..... in such dock or at such wharf or place (where she may safely lie, always afloat, at all times of tide, except as otherwise provided in clause No. 6), as the Charterers may direct. If such dock, wharf or place be not available time to count as provided for in clause No. 5. Vessel on her delivery to be ready to receive cargo with clean-swept holds and tight, staunch, strong and in every way fitted for the service, having water ballast, winches and donkey boiler with sufficient steam power, or if not equipped with donkey boiler, then other power sufficient to run all the winches at one and the same time (and with full complement of officers, seamen, engineers and firemen for a vessel of her tonnage), to be employed, in carrying lawful merchandise, including petroleum or its products, in proper containers, excluding .....
(vessel is not to be employed in the carriage of Live Stock, but Charterers are to have the privilege of shipping a small number on deck at their risk, all necessary fittings and other requirements to be for account of Charterers), in such lawful trades, between safe port and/or ports in British North America, and/or United States of America, and/or West Indies, and/or Central America, and/or Caribbean Sea, and/or Gulf of Mexico, and/or Mexico, and/or South America .....
..... and/or Europe and/or Africa, and/or Asia, and/or Australia, and/or Tasmania, and/or New Zealand, but excluding Magdalena River, River St. Lawrence between October 31st and May 15th, Hudson Bay and all unsafe ports; also excluding, when out of season, White Sea, Black Sea and the Baltic,

.....

.....

.....

as the Charterers or their Agents shall direct, on the following conditions:

1. That the Owners shall provide and pay for all provisions, wages and consular shipping and discharging fees of the Crew; shall pay for the insurance of the vessel, also for all the cabin, deck, engine-room and other necessary stores, including boiler water and maintain her class and keep the vessel in a thoroughly efficient state in hull, machinery and equipment for and during the service.

2. That the Charterers shall provide and pay for all the fuel except as otherwise agreed, Port Charges, Pilotages, Agencies, Commissions, Consular Charges (except those pertaining to the Crew), and all other usual expenses except those before stated, but when the vessel puts into a port for causes for which vessel is responsible, then all such charges incurred shall be paid by the Owners. Fumigations ordered because of illness of the crew to be for Owners account. Fumigations ordered because of cargoes carried or ports visited while vessel is employed under this charter to be for Charterers account. All other fumigations to be for Charterers account after vessel has been on charter for a continuous period of six months or more.

Charterers are to provide necessary dunnage and shifting boards, also any extra fittings requisite for a special trade or unusual cargo, but Owners to allow them the use of any dunnage and shifting boards already aboard vessel. Charterers to have the privilege of using shifting boards for dunnage, they making good any damage thereto.

3. That the Charterers, at the port of delivery, and the Owners, at the port of re-delivery, shall take over and pay for all fuel remaining on board the vessel at the current prices in the respective ports, the vessel to be delivered with not less than ..... tons and not more

than ..... tons and to be re-delivered with not less than ..... tons and not more than ..... tons.

4. That the Charterers shall pay for the use and hire of the said Vessel at the rate of .... United States Currency per ton on vessel's total deadweight carrying capacity, including bunkers and stores, on ..... summer freeboard, per Calendar Month, commencing on and from the day of her delivery, as aforesaid, and at and after the same rate for any part of a month; hire to continue until the hour of the day of her re-delivery in like good order and condition, ordinary wear and tear excepted, to the Owners (unless lost) at ..... unless otherwise mutually agreed. Charterers are to give Owners not less than ..... days notice of vessels expected date of re-delivery, and probable port.

5. Payment of said hire to be made in New York in cash in United States Currency, semi-monthly in advance, and for the last half month or part of same the approximate amount of hire, and should same not cover the actual time, hire is to be paid for the balance day by day, as it becomes due, if so required by Owners, unless bank guarantee or deposit is made by the Charterers, otherwise failing the punctual and regular payment of the hire, or bank guarantee, or on any breach of this Charter Party, the Owners shall be at liberty to withdraw the vessel from the service of the Charterers, without prejudice to any claim they (the Owners) may otherwise have on the Charterers. Time to count from 7 a.m. on the working day following that on which written notice of readiness has been given to Charterers or their Agents before 4 p.m., but if required by Charterers, they to have the privilege of using vessel at once, such time used to count as hire.

Cash for vessel's ordinary disbursements at any port may be advanced as required by the Captain, by the Charterers or their Agents, subject to 2½% commission

and such advances shall be deducted from the hire. The Charterers, however, shall in no way be responsible for the application of such advances.

6. That the cargo or cargoes be laden and/or discharged in any dock or at any wharf or place that Charterers or their Agents may direct, provided the vessel can safely lie always afloat at any time of tide, except at such places where it is customary for similar size vessels to safely lie aground.

7. That the whole reach of the Vessel's Hold, Decks, and usual places of loading (not more than she can reasonably stow and carry), also accommodations for Supercargo, if carried, shall be at the Charterers' disposal, reserving only proper and sufficient space for Ship's officers, crew, tackle, apparel, furniture, provisions, stores and fuel. Charterers have the privilege of passengers as far as accommodations allow, Charterers paying Owners ..... per day per passenger for accommodations and meals. However, it is agreed that in case any fines or extra expenses are incurred in the consequence of the carriage of passengers, Charterers are to bear such risk and expense.

8. That the Captain shall prosecute his voyages with the utmost despatch, and shall render all customary assistance with ship's crew and boats. The Captain (although appointed by the Owners), shall be under the orders and directions of the Charterers as regards employment and agency; and Charterers are to load, stow, and trim the cargo at their expense under the supervision of the Captain, who is to sign Bills of Lading for cargo as presented, in conformity with Mate's or Tally Clerk's receipts.

9. That if the Charterers shall have reason to be dissatisfied with the conduct of the Captain, Officers, or Engineers, the Owners shall on receiving particulars of the complaint, investigate the same, and, if necessary, make a change in the appointments.

10. That the Charterers shall have permission to appoint a Supercargo, who shall accompany the vessel and see that voyages are prosecuted with the utmost despatch. He is to be furnished with free accommodation, and same fare as provided for Captain's table, Charterers paying at the rate of $1.00 per day. Owners to victual Pilots and Customs Officers, and also, when authorized by Charterers or their Agents, to victual Tally Clerks, Stevedore's Foreman, etc., Charterers paying at the current rate per meal, for all such victualling.

11. That the Charterers shall furnish the Captain from time to time with all requisite instructions and sailing directions, in writing, and the Captain shall keep a full and correct Log of the voyage or voyages, which are to be patent to the Charterers or their Agents, and furnish the Charterers, their Agents or Supercargo, when required, with a true copy of daily Logs, showing the course of the vessel and distance run and the consumption of fuel.

12. That the Captain shall use diligence in caring for the ventilation of the cargo.

13. That the Charterers shall have the option of continuing this charter for a further period of .... on giving written notice thereof to the Owners or their Agents ..... days previous to the expiration of the first-named term, or any declared option.

14. That if required by Charterers, time not to commence before ..... and should vessel not have given written notice of readiness on or before ..... but not later than 4 p.m. Charterers or their Agents to have the option of cancelling this Charter at any time not later than the day of vessel's readiness.

15. That in the event of the loss of time from deficiency of men or stores, fire, breakdown or damages to

hull, machinery or equipment, grounding, detention by average accidents to ship or cargo, drydocking for the purpose of examination or painting bottom, or by any other cause preventing the full working of the vessel, the payment of hire shall cease for the time thereby lost; and if upon the voyage the speed be reduced by defect in or breakdown of any part of her hull, machinery or equipment, the time so lost, and the cost of any extra fuel consumed in consequence thereof, and all extra expenses shall be deducted from the hire.

16. That should the Vessel be lost, money paid in advance and not earned (reckoning from the date of loss or being last heard of) shall be returned to the Charterers at once. The act of God, enemies, fire, restraint of Princes, Rulers and People, and all dangers and accidents of the Seas, Rivers, Machinery, Boilers and Steam Navigation, and errors of Navigation throughout this Charter Party, always mutually excepted.

The vessel shall have the liberty to sail with or without pilots, to tow and to be towed, to assist vessels in distress, and to deviate for the purpose of saving life and property.

17. That should any dispute arise between Owners and the Charterers, the matter in dispute shall be referred to three persons at New York, one to be appointed by each of the parties hereto, and the third by the two so chosen; their decision or that of any two of them, shall be final, and for the purpose of enforcing any award, this agreement may be made a rule of the Court. The Arbitrators shall be commercial men.

18. That the Owners shall have a lien upon all cargoes, and all sub-freights for any amounts due under this Charter, including General Average contributions, and the Charterers to have a lien on the Ship for all monies paid in advance and not earned, and any overpaid hire or excess deposit to be returned at once. Char-

terers will not suffer, nor permit to be continued, any lien or encumbrance incurred by them or their agents, which might have priority over the title and interest of the owners in the vessel.

19. That all derelicts and salvage shall be for Owners' and Charterers' equal benefit after deducting Owners' and Charterers' expenses and Crew's proportion. General Average shall be adjusted, stated and settled, according to Rules 1 to 15, inclusive, 17 to 22, inclusive, and Rule F of York-Antwerp Rules 1924, at such port or place in the United States as may be selected by the carrier, and as to matters not provided for by these Rules, according to the laws and usages at the port of New York. In such adjustment disbursements in foreign currencies shall be exchanged into United States money at the rate prevailing on the dates made and allowances for damage to cargo claimed in foreign currency shall be converted at the rate prevailing on the last day of discharge at the port or place of final discharge of such damaged cargo from the ship. Average agreement or bond and such additional security, as may be required by the carrier, must be furnished before delivery of the goods. Such cash deposit as the carrier or his agents may deem sufficient as additional security for the contribution of the goods and for any salvage and special charges thereon, shall, if required, be made by the goods, shippers, consignees or owners of the goods to the carrier before delivery. Such deposit shall, at the option of the carrier, be payable in United States money and be remitted to the adjuster. When so remitted the deposit shall be held in a special account at the place of adjustment in the name of the adjuster pending settlement of the General Average and refunds or credit balances, if any, shall be paid in United States money.

In the event of accident, danger, damage, or disaster, before or after commencement of the voyage resulting from any cause whatsoever, whether due to negligence or

not, for which, or for the consequence of which, the carrier is not responsible, by statute, contract, or otherwise, the goods, the shipper and the consignee, jointly and severally, shall contribute with the carrier in general average to the payment of any sacrifices, losses, or expenses of a general average nature that may be made or incurred, and shall pay salvage and special charges incurred in respect to the goods. If a salving ship is owned or operated by the carrier, salvage shall be paid for as fully and in the same manner as if such salving ship or ships belonged to strangers.

Provisions as to General Average in accordance with the above are to be included in all bills of lading issued hereunder.

20. Fuel used by the vessel while off hire, also for cooking, condensing water, or for grates and stoves to be agreed to as to quantity, and the cost of replacing same, to be allowed by Owners.

21. That as the vessel may be from time to time employed in tropical waters during the term of this Charter, Vessel is to be docked at a convenient place, bottom cleaned and painted whenever Charterers and Captain think necessary, at least once in every six months, reckoning from time of last painting, and payment of the hire to be suspended until she is again in proper state for the service.

. . . . . .

. . . . . .

22. Owners shall maintain the gear of the ship as fitted, providing gear (for all derricks) capable of handling lifts up to three tons, also providing ropes, falls, slings and blocks. If vessel is fitted with derricks capable of handling heavier lifts, Owners are to provide necessary gear for same, otherwise equipment and gear for heavier lifts shall be for Charterers' account. Owners also to provide on the vessel lanterns and oil for night

work, and vessel to give use of electric light when so fitted, but any additional lights over those on board to be at Charterers' expense. The Charterers to have the use of any gear on board the vessel.

23. Vessel to work night and day, if required by Charterers, and all winches to be at Charterers' disposal during loading and discharging; steamer to provide one winchman per hatch to work winches day and night, as required, Charterers agreeing to pay officers, engineers, winchmen, deck hands and donkeymen for overtime work done in accordance with the working hours and rates stated in the ship's articles. If the rules of the port, or labor unions, prevent crew from driving winches, shore Winchmen to be paid by Charterers. In the event of a disabled winch or winches, or insufficient power to operate winches, Owners to pay for shore engine, or engines, in lieu thereof, if required, and pay any loss of time occasioned thereby.

24. It is also mutually agreed that this Charter is subject to all the terms and provisions of and all the exemptions from liability contained in the Act of Congress of the United States approved on the 13th day of February, 1893, and entitled "An Act relating to Navigation of Vessels, etc.," in respect of all cargo shipped under this charter to or from the United States of America. It is further subject to the following clauses, both of which are to be included in all bills of lading issued hereunder:

U.S.A. Clause Paramount

This bill of lading shall have effect subject to the provisions of the Carriage of Goods by Sea Act of the United States, approved April 16, 1936, which shall be deemed to be incorporated herein, and nothing herein contained shall be deemed a surrender by the carrier of any of its rights or immunities or an increase of any of its responsibilities or liabilities

under said Act. If any term of this bill of lading be repugnant to said Act to any extent, such term shall be void to that extent, but no further.

Both-to-Blame Collision Clause

If the ship comes into collision with another ship as a result of the negligence of the other ship and any act, neglect or default of the Master, mariner, pilot or the servants of the Carrier in the navigation or in the management of the ship, the owners of the goods carried hereunder will indemnify the Carrier against all loss or liability to the other or non-carrying ship or her owners in so far as such loss or liability represents loss of, or damage to, or any claim whatsoever of the owners of said goods, paid or payable by the other or non-carrying ship or her owners to the owners of said goods and set off, recouped or recovered by the other or non-carrying ship or her owners as part of their claim against the carrying ship or carrier.

25. The vessel shall not be required to enter any ice-bound port, or any port where lights or light-ships have been or are about to be withdrawn by reason of ice, or where there is risk that in the ordinary course of things the vessel will not be able on account of ice to safely enter the port or to get out after having completed loading or discharging.

26. Nothing herein stated is to be construed as a demise of the vessel to the Time Charterers. The owners to remain responsible for the navigation of the vessel, insurance, crew, and all other matters, same as when trading for their own account.

27. A commission of 2½ per cent is payable by the Vessel and Owners to .... on hire earned and paid under this Charter, and also upon any continuation or extension of this Charter.

28. An address commission of 2½ per cent payable to ..... on the hire earned and paid under this Charter.

By cable authority from

As.....For Owners

The original Charter Party in our possession.

BROKERS.

APPENDIX 7

DECISIONS RENDERED IN CONSOLIDATED ARBITRATION PROCEEDINGS*

1. *In the Matter of the Arbitration Between Transocean Gulf Oil Co. and Afran Transport Co. and Occidental Crude Sales, Inc.*, SMA 1950 (March 29, 1984).

2. *In the Matter of the Arbitration Between Insco Shipping Co., Inc., and Alpine Bulk Transport Co., Inc., and Northern Sales Co., Ltd.*, SMA 1937 (February 7, 1984).

3. *In the Matter of the Arbitration Between Insco Shipping Co., Inc., and Alpine Bulk Transport Co., Inc., and Northern Sales Co., Ltd.*, SMA 1936 (February 7, 1984).

4. *In the Matter of the Arbitration Between Supreme Maritime, Ltd., and Voest-Alpine International, Inc., and Brindavan Alloys, Ltd.*, SMA 1932 (February 8, 1984).

5. *In the Matter of the Arbitration Between Sameiet Dea Brovig and General Navigation, Inc., and General Molasses Corp.*, SMA 1931 (February 9, 1984).

6. *In the Matter of the Arbitration Between Marine Transport Lines, Inc., and Northeast Petroleum Corp. and Atlantic Richfield Co.*, SMA 1909 (November 14, 1983).

7. *In the Matter of the Arbitration Between Federal Commerce & Navigation, (1974) Ltd., and Shinwa Kaiun Kaisha, Ltd. and Ceres Hellenic Shipping Enterprises, Ltd.*, SMA 1894 (October 21, 1983).

8. *In the Matter of the Arbitration Between Fortune Marine Corp. and Japan Line, Ltd., and Sanko Steamship Co., Ltd.*, SMA 1892 (October 10, 1983).

---

* As reported in Society of Maritime Arbitrators, Inc., *Award Service of the Society of Maritime Arbitrators* (1975-83) ("SMA").

9. *In the Matter of the Arbitration Between Kent Line, Ltd. and Skaarup Shipping Corp. and Flintkote Co.*, SMA 1884 (September 21, 1983).

10. *In the Matter of the Arbitration Between Grafton Shipping Panama, S.A., and Mobil Tankers Co. (Liberia), Ltd., and Glenarm Financiera Panama, S.A.*, SMA 1840 (June 15, 1983).

11. *In the Matter of the Arbitration Between Haniel Coal & Mining Co. and Thyssen Carbometal Co. and Resolution Island Shipping Corp.*, SMA 1829 (May 6, 1983).

12. *In the Matter of the Arbitration Between Pollux Marine Agencies, Inc., and Laura Shipping Corp. and Companhia Nacional de Navegacao*, SMA 1819 (April 25, 1983).

13. *In the Matter of the Arbitration Between Sears Oil Co., Inc., and Anschutz Petroleum A.G. and Merrick Shipping Co., Ltd.*, SMA 1816 (May 2, 1983).

14. *In the Matter of the Arbitration Between Maritime Transport Operations and K & K Marine Corp. and Fritz Companies, Inc.*, SMA 1785 (January 19, 1983).

15. *In the Matter of the Arbitration Between Starlight Trading Co. of New York and Hanlet Shipping, Inc., and The Egyptial Co. for Maritime Transport and The Egyptian Commercial and Economic Office of Wash., D.C.*, SMA 1777 (September 25, 1982).

16. *In the Matter of the Arbitration Between Intercast, S.A., and Mineral ImportExport and Cook Transportation Systems, Inc., and Richmond Shipping, Ltd., and Itel Carina*, SMA 1715 (August 20, 1982).

17. *In the Matter of the Arbitration Between All Oceans Transport, Inc., and John A. Kistvad & Co., A.P.S., and Metal Transport Corp.*, SMA 1677 (May 17, 1982).

18. *In the Matter of the Arbitration Between One Shipping, Ltd., and Esso Chemical Supply Co., Inc., and Borden Interamerica, Inc.*, SMA 1673 (May 27, 1982).

19. *In the Matter of the Arbitration Between Daiichi Chuo Kisen Kaisha and Dundas Shipping and Trading Co., Ltd., and Buck Shipping International, Ltd.*, SMA 1666 (April 20, 1982).

20. *In the Matter of the Arbitration Between Establissment Maritime Camille and Worldwide Sugar Corp. and The National Sugar Refining Co. and International Terminal Operating Co., Inc.*, SMA 1623 (January 8, 1982).

21. *In the Matter of the Arbitration Between Quebec Maritime, Inc., and Oldfield Corp. and Anglo-Canadian Shipping*, SMA 1616 (November 20, 1981).

22. *In the Matter of the Arbitration Between Unimarine S.A. and A/S Mosvolds Rederi and Interessentslakapet Wind Endeavor and Bangladesh Ministry of Food*, SMA 1612 (December 7, 1981).

23. *In the Matter of the Arbitration Between Tramp Shipping Co., Inc. and Gotaas-Larsen A/S and Emerald Shipping Corp. and Sanko Steamship Co., Ltd., and Parabola Shipping U.K., Ltd., and Himoff Maritime Enterprises, Ltd., and Mardorf Peach & Co., Ltd.*, SMA 1602 (October 30, 1981).

24. *In the Matter of the Arbitration Between Unimarine S.A. and A/S Mosvolds Rederi and Interessentslakapet and Bangladesh Ministry of Food*, SMA 1533 (March 31, 1981).

25. *In the Matter of the Arbitration Between Star Shipping Co., Inc., and Universal Bulk Carriers, Inc., and Federal Commerce and Navigation Co., Ltd., and Louis Dreyfus Corp.*, SMA 1502 (October 31, 1980).

26. *In the Matter of the Arbitration Between Inca Compania Maritime, S.A., and Sincerity Marine Corp.*

of Liberia and Atlantic Richfield Co., SMA 1501 (December 12, 1980).

27. *In the Matter of the Arbitration Between Banco Nacional De Nicaragua and International Affiliates, Inc., and Navigation Transoceanique, S.A., and Dempo Steamship, Ltd.*, SMA 1484 (July 16, 1980).

28. *In the Matter of the Arbitration Between Internav, Ltd., and Scanbulk, Ltd., and Transbulk, Ltd., and Sidbec International*, SMA 1454 (July 25, 1980).

29. *In the Matter of the Arbitration Between Parcel Tankers, Inc., and Sidomar, S.A.—Vaduz, and Mitsubishi Corp.—Tokyo*, SMA 1444 (April 24, 1980).

30. *In the Matter of the Arbitration Between Skibs A/S Agnes and Showa Shipping Co., Inc., and Tradax Internacional, S.A.*, SMA 1442 (May 9, 1980).

31. *In the Matter of the Arbitration Between Ilkon Dalio Shipping Co., Ltd., and Gulf Far East Lines, Ltd., and Iran Express Lines*, SMA 1430 (April 22, 1980).

32. *In the Matter of the Arbitration Between Federal Commerce & Navigation (1974), Ltd., and "Finagrain" Compagnie Commerciale Agricole et Financiere, S.A., and Bunge Corp.*, SMA 1380 (November 19, 1979).

33. *In the Matter of the Arbitration Between Ore Sea Transport, S.A., and Skjelbeeds Rederi A/S and National Shipping & Trading Corp., New York*, SMA 1362 (September 19, 1979).

34. *In the Matter of the Arbitration Between Kommandittselskapet Unibulk A/S and Canadian Transport Co., Ltd., and Transamerican Steamship Corp.*, SMA 1327 (June 8, 1979).

35. *In the Matter of the Arbitration Between Palmco Shipping, Inc., and Isco, Inc., and Nippon Yusen Kaisha and Gemini Shipping, Inc.*, SMA 1324 (June 15, 1979).

36. *In the Matter of the Arbitration Between Czarnikow-Rionda Co., Inc., and Eddie Steamship Co., Ltd., and Colonial Sugars Co.*, SMA 1322B (June 8, 1979).

37. *In the Matter of the Arbitration Between Compania Naviera Kanaris, S.A., and Skibs A/S Skytteren and Federal Commerce & Navigation Co., Ltd.*, SMA 1295 (January 31, 1979).

38. *In the Matter of the Arbitration Between Federal Commerce & Navigation (1974), Ltd., and "Finagrain" Compagnie Commerciale Agricole et Financiere, S.A., and Bunge Corp.*, SMA 1291 (January 12, 1979).

39. *In the Matter of the Arbitration Between Alcoa Steamship Co., Inc., and Federal Commerce & Navigation Co., Ltd., of Montreal, and Louis Dreyfus Corp. and Marubeni Corp., Tokyo*, SMA 1233 (May 26, 1978).

40. *In the Matter of the Arbitration Between Jade Enterprises, Ltd., and Samincorp, Inc., and Chemfertz Representacoes Commercial, Ltda.*, SMA 1229 (April 20, 1978).

41. *In the Matter of the Arbitration Between Marsimbol Compania Naviera, S.A., and Margauro Steamship Corp. and International Produce, Inc.*, SMA 1150 (September 20, 1977).

42. *In the Matter of the Arbitration Between Atlantic Tankers, Ltd., and Foreign Energy Tankers, Inc., and Coastal States Gas Corp.*, SMA 1121 (May 12, 1977).

43. *In the Matter of the Arbitration Between Sanko Steamship Co., Ltd., and Burmah Oil Tankers, Ltd., and C.R. Rittenberry & Associates*, SMA 1112 (August 8, 1977).

44. *In the Matter of the Arbitration Between Seaboard Overseas, Ltd., and Insco Lines, Ltd., and Cypromar Navigation Co., Ltd.*, SMA 1065 (October 15, 1976).

45. *In the Matter of the Arbitration Between Oceanic Freighters Corp. and Louis Dreyfus Corp. and Sagus*

Marine Corp. and Seatankers, Inc., SMA 1054 (August 10, 1976).

46. *In the Matter of the Arbitration Between Sirikari Compania Naviera, S.A., and Isco, Inc., and Transamerican Ocean Contractors, Inc.*, SMA 1035 (June 4, 1975).

47. *In the Matter of the Arbitration Between Constellation Bulk Carriers, Inc., and Nissho-Iwai American Corp. and Hugo Neu & Sons International Sales Corp.*, SMA 977 (October 10, 1975).

Office - Supreme Court, U.S.
FILED
OCT 27 1984
ALEXANDER L. STEVAS
CLERK

No. 84-470

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1984

WEYERHAEUSER COMPANY,
Petitioner,

vs.

TRANS-PACIFIC SHIPPING CO., as successor in interest to
WESTERN SEAS SHIPPING COMPANY and
EASTERN SEAS SHIPPING COMPANY, and
KARLANDER (AUSTRALIA) PTY. LTD.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF RESPONDENT KARLANDER (AUSTRALIA) PTY. LTD. IN OPPOSITION

GRAYDON S. STARING
D. THOMAS MCCUNE
(Counsel of Record)
LILLICK MCHOSE & CHARLES
Two Embarcadero Center
Suite 2600
San Francisco, CA 94111
(415) 421-4600
Counsel for Respondent Karlander (Australia) Pty. Ltd.

BOWNE OF SAN FRANCISCO, INC. • 190 NINTH ST. • S.F., CA 94103 • (415) 864-2300

QUESTION PRESENTED

Whether a District Court, without the consent of the parties, may properly order consolidation of separate arbitrations between different parties, where each arises under a different contract with an arbitration clause containing no provision for such consolidation and the first contract made provides that the making of the second shall not increase any obligation of a party to the first.

TABLE OF CONTENTS

	Page
Statement of the case	1
Reasons for denying the petition	3
I	
The record does not present an actual conflict between courts of appeals as to the power of consolidation	3
II	
The question lacks the importance asserted by petitioner	7
A. The incidence of problems is exaggerated by petitioner	7
B. The instant case creates no confusion or uncertainty and raises no problem of admiralty uniformity	8
C. The decision here does not discourage arbitration, impair its utility or burden commerce or the courts	10
D. The decision itself is sound	11
Conclusion	11

TABLE OF AUTHORITIES

Cases

	Page
Compania Espanola de Petroleos, S.A. v. Nereus Shipping, S.A., 527 F.2d 966 (2d Cir. 1975), cert. denied, 426 U.S. 936 (1976)	3-5
Kossick v. United Fruit Co., 365 U.S. 731 (1961)	9
Union Fish Co. v. Erickson, 248 U.S. 308 (1919)	9

Rules

Supreme Court Rule 17.1(a)	3

Other

Benedict on Admiralty, Vols. 2A and 2B, Seventh Edition [Revised] 1984	8
M. Wilford, T. Coghlin, N. Healy, Jr. & J. Kimball, Time Charters (2d Ed. 1982)	8

No. 84-470

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1984

WEYERHAEUSER COMPANY,
Petitioner,

VS.

TRANS-PACIFIC SHIPPING CO., as successor in interest to
WESTERN SEAS SHIPPING COMPANY and
EASTERN SEAS SHIPPING COMPANY, and
KARLANDER (AUSTRALIA) PTY. LTD.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF RESPONDENT KARLANDER (AUSTRALIA) PTY. LTD. IN OPPOSITION

STATEMENT OF THE CASE

Although the Statement in the Petition is substantially correct as to most of the objective facts, Respondent does not agree with certain characterizations and conclusions. In particular, it is not true that the parties agree that there is but a single dispute referrable to arbitration or that Weyerhaeuser's responsibility is no more than that of a "conduit". (Pet. p. 6.) All the relevant facts may be restated more briefly, as follows.

Two vessels, the Pacduke and the Pacduchess, were time chartered by Respondents Western Seas and Eastern Seas ("owners") to Petitioner Weyerhaeuser in 1974. Weyerhaeuser later subchartered the vessels to Respondent Karlander. About the time Weyerhaeuser subchartered the vessels, owners, as the district judge found, "secured an addendum agreement with Weyerhaeuser insulating them from any increase in their obligations by reason of any subcharter Weyerhaeuser might execute". (Pet. A-11.)

During the pendency of the subcharters, Weyerhaeuser imposed restrictions on Karlander's use of the vessels, as a result of which Karlander claims substantial losses. Each of the charters and each of the subcharters contained the following arbitration clause:

> That should any dispute arise between Owners and the Charterers, the matter in dispute shall be referred to three persons in San Francisco, one to be appointed by each of the parties hereto, and a third by the two so chosen; their decision or that of any two of them, shall be final and for the purpose of enforcing any award, this agreement may be made a rule of Court. The Arbitrators shall be commercial men conversant with shipping matters.

Pursuant to the subcharter clauses, Karlander demanded arbitration with Weyerhaeuser. Weyerhaeuser then asserted a dispute with owners over the same restrictions and demanded arbitration under the clauses in the charters between them. Weyerhaeuser later filed its petition in the district court to compel consolidation of the arbitrations under the head-charters with the arbitrations under the subcharters. Owners and Karlander opposed consolidation, relying on their contractual rights to pursue their bilateral

arbitrations with Weyerhaeuser individually. The decisions of the district court and the Court of Appeals (Pet., Appendices 3 and 2) followed.

REASONS FOR DENYING THE PETITION

I

THE RECORD DOES NOT PRESENT AN ACTUAL CONFLICT BETWEEN COURTS OF APPEALS AS TO THE POWER OF CONSOLIDATION

The Second Circuit in *Compania Espanola de Petroleos, S.A. v. Nereus Shipping, S.A.*, 527 F.2d 966 (2d Cir. 1975), *cert. denied*, 426 U.S. 936 (1976) and the Ninth Circuit in the present case have made inconsistent statements on the subject of consolidation. But the jurisdiction of the Supreme Court is not exercised to resolve the inconsistent statements of others when they do not present a conflict of holdings as to the same matter. See Supreme Court Rule 17.1(a).

There is no conflict between the Circuits with respect to the consolidation of arbitration proceedings. The Court of Appeals for the Second Circuit has never decided any case whatever presenting a question of consolidation. Any appearance to the contrary is an illusion due to the disorderly record and cloudy opinion in *Compania Espanola de Petroleos, S.A. v. Nereus Shipping, S.A., supra.*

In that case the Court of Appeals deplored for half a page (p. 968) the extraordinarily confused record which the district judge and counsel below had made. The Court of Appeals thought it had successfully found the contents of "the outer shell of this mass of confusion and procedural

effluvia" (p. 968). But the confusion was contagious and clearly infected the appellate court.

The relevant facts were these. An owner and charterer signed an agreement (p. 968, col. 2). The agreement contained an arbitration clause (p. 969, col. 1). The clause covered "disputes of whatever nature arising out of" the agreement (p. 968, col. 1). It also provided that during an arbitration any party could by notice "specify further disputes" to be submitted to the same arbitration (p. 969, col. 2). A third party guaranteed the charterer's performance and all three parties signed a new agreement as an addendum to the original (p. 969, col. 2). In the addendum the guarantor undertook obligations "on the same terms and conditions" as in the original agreement (p. 969, col. 2). A dispute arose out of the agreement as to default of the charterer (p. 970, col. 1). The owner, by two separate notices, demanded arbitration with both the charterer and the guarantor (p. 970, col. 2). The guarantor denied it had agreed to arbitrate (p. 970, col. 2).

The district judge found and the Court of Appeals affirmed that the guarantor had agreed to arbitrate: "We think all that Judge Stewart decided, and all he intended to decide, was that Cepsa [the guarantor] had agreed to arbitrate" (p. 971, col. 2). At this point there were three parties interested in a dispute which was subject to a single arbitration clause, to which they had agreed, providing for the simultaneous arbitration, if necessary, of several disputes. It followed that each, as a party to the agreement, was entitled to participate in the arbitration and bound by the result. There is no authority and no tenable argument to sustain the contrary view that any one of them could

have been excluded. There was nothing whatsoever to consolidate.

The record is not clear how the notion of consolidation arose (p. 972, col. 1). One of the parties resisted three-party arbitration. Either the parties and the district judge did not understand the situation or a party for tactical reasons succeeded in confusing the issue. Whatever the reason (perhaps because he thought of the two notices as two arbitrations) the district judge was confused and entered a "consolidation order" (p. 972, col. 1). The Court of Appeals never penetrated the shell of that confusion but repeated it. At the same time it came curiously close to perceiving the true situation when it said (p. 970, col. 1) that the agreement and the addendum "must be read together" and specially pointed out the provision for presenting successive disputes to the same arbitration. *(Id.)* The Court of Appeals' repetitions of the expression of a district court which had had nothing to consolidate and had consolidated nothing were pure dictum.[1]

In the instant Ninth Circuit case, the relevant facts are these. The owners (Respondents Western Seas and Eastern Seas) signed agreements with a charterer (Petitioner here). They contain arbitration clauses. The charterer made agreements with a subcharterer (Respondent Karlander). They also contain arbitration clauses. The three parties never entered into any single agreement. There was

---

[1]Petitioner points out (Pet. p. 13, n.9) that one district court has read *Compania Espanola* as holding that a federal court may order consolidation of arbitrations over the objection of one of the disputants. This is not a strong indication of jurisprudential significance.

not a novation to place the subcharterer into a contract relationship with the owners. To the contrary, the owners and the charterer entered into a supplemental agreement that the subcharters should not result in any increase in the owners' obligations. A dispute arose because of restrictions imposed by the charterer on the subcharterer's use of the vessels. The charterer, evidently not having previously disputed such matters with the owners, now apparently denies its complicity in imposing the restrictions.

The subcharterer was not in privity with the agreement between the owners and charterer and had no legal interest in their amending their relationship as they in fact did. It had no standing to interfere in and no responsibility for the charterer's acceptance of the restrictions imposed by owners. The issues raised by the subcharterer's objections to the restrictions imposed by the charterer are not the issues raised as to whether and why those restrictions were agreed between owners and charterer. On the contrary, they are entirely separate.

The district court here found the two-party addendum between owners and Petitioner (in contrast to the three-party addendum in the Second Circuit case) to be an understanding which would be directly contravened by joint arbitration (Pet. A-1). The Court of Appeals here noted the same agreement and apparently gave the same weight to it (Pet. A-3).

Assuming without conceding that the Ninth Circuit decision here stands only upon lack of power to consolidate (rather than agreement restricting two of the parties from

doing so against the will of another), there is conflict only with district court decisions, all but one of them in the Southern District of New York. When someone takes an appeal from an order involving an actual consolidation of two arbitrations there, the Court of Appeals for the Second Circuit will have an opportunity for the first time to consider this question in its true light, where the parties have not consented to joint arbitration. If the Court of Appeals then upholds the asserted power to consolidate without consent, it may then be time to consider granting a writ of certiorari, presumably upon a record and opinion which present the issue with a clarity and a significance which are lacking here.

II

THE QUESTION LACKS THE IMPORTANCE ASSERTED BY PETITIONER

A. The Incidence of Problems Is Exaggerated by Petitioner

Petitioner asserts, and the literature cited (Pet. 13-14) confirms, that arbitration clauses have been commonly used in charter parties for many years. But until the 1970's no evidence appears of attempts to compel consolidation and thereafter only a few cases have been reported. The fair inference is that parties to arbitration agreements have generally got along very well without judicial interference on this point. It is most telling perhaps that, with a long experience of traditional chartering and sub-chartering patterns, there is no evidence that owners, charterers, their brokers or the institutions which develop standard forms such as the New York Produce Exchange form (Petition

App. 6) have ever felt the need for a clause providing for consolidation.[2]

If there is any problem at all, the New York arbitrations referred to by Petitioner (Pet. pp. A-38-A-43) are no part of it. They largely reflect instances where parties have been willing to acquiesce in consolidated arbitrations. If they signify anything more, such as a New York custom or usage, that will be undisturbed by the decision in the instant case in the Ninth Circuit. Petitioner presents no evidence of any substantial incidence of arbitrations in San Francisco or the Ninth Circuit or any usage or expectation there which will be disturbed.

B. The Instant Case Creates No Confusion or Uncertainty and Raises No Problem of Admiralty Uniformity

Petitioner overlooks the fact that charter party arbitration clauses almost invariably specify the locale of the arbitration (*See, e.g.,* Petition, App. 6, p. A-32, Clause 17 and charter party forms collected in *Benedict on Admiralty,* Vols. 2A and 2B, Seventh Edition [Revised] 1984). The Ninth Circuit decision is binding only upon courts of the Ninth Circuit. By naming the city, the parties know exactly where they will arbitrate if they must. The Ninth Circuit decision rather avoids than creates any uncertainty or confusion in San Francisco, and it creates none in New York.

---

[2]The New York Produce Exchange form was revised in 1981 under the auspices of the Association of Ship Brokers and Agents. The arbitration provision is virtually unchanged from the 1946 version and the form contains no provision for consolidation of arbitrations. The 1981 form is reprinted in M. Wilford, T. Coghlin, N. Healy, Jr. & J. Kimball, *Time Charters* (2d ed. 1982) at Appendix E.

There is nothing whatever to Petitioner's reliance argument. One may doubt that parties who had got along for decades without provisions in the law or the clauses for compulsory consolidation continued to make the same contracts as before in sudden reliance upon the Second Circuit decision but, if they did, such reliance was certainly unwarranted with respect to clauses fixing the locale at the other end of the country. There is no evidence of even possible reliance outside New York, which is unaffected by the Ninth Circuit decision, and the charters here between Petitioner and Respondents Western Seas and Eastern Seas were certainly not made in reliance upon the Second Circuit decision, as they antedate it.

Petitioner faintly invokes the constitutional doctrine of admiralty uniformity (Pet. p. 17). The decision here raises no problem under that doctrine. It is true that the commercial provisions of charter parties are subject to the maritime law and the significance of this is that they are not subject to varying state laws of contract. The doctrine of uniformity is a shield against incursions of state law.[3] Uniformity does not require that parties follow the same procedures of dispute settlement under different contracts and local practices. Petitioner fails to recognize that the Arbitration Act applies to all contracts in international and interstate commerce containing arbitration clauses. Of that number charter parties are only a small part, while the vast majority are governed by state or foreign law with the exception of enforcement of their arbitration clauses. Admiralty can make no claim to wag the whole dog.

---

[3]See, e.g., Union Fish Co. v. Erickson, 248 U.S. 308 (1919); Kossick v. United Fruit Co., 365 U.S. 731 (1961).

C. The Decision Here Does Not Discourage Arbitration, Impair Its Utility or Burden Commerce or the Courts

It is not true that the decision here discourages the use of arbitration. In asserting that it does so Petitioner assumes that parties generally want what two out of three parties have refused to consent to in the instant case. There is, of course, no ground for that assumption. On the other hand there is ample reason to assume that persons who contract to take their disputes out of the courts and dispose of them under agreed terms and rules may be reluctant to continue to do so if the courts can interfere to set aside the procedures to which they have agreed. We have, moreover, a long history of parties being content to do without consolidation in the absence of consent. If the parties agree, consolidation can easily be provided for in the arbitration clauses. Alternatively, if there is a New York custom or usage, the parties can easily avail themselves of it by contracting for New York as the arbitration locale.

There is also no evidence that the utility of arbitration will be impaired by leaving it to the parties to agree to consolidation either beforehand with respect to related transactions or when disputes arise.

Nor does the decision here impose any perceptible burden upon commerce (which is presumably not burdened by freedom of contract) or upon the courts. Indeed the clear rule of the decisions here eliminates potential litigation in the Ninth Circuit as to whether particular arbitrations are appropriate to consolidate. As for proceedings to vacate awards, it is mere speculation to suppose (Pet. p. 20) that the dissatisfaction of the ultimate loser and

availability of the severely limited grounds for vacating the award against him will vary appreciably according to the number of arbitrations which have occurred or will outweigh the legal problems which arise from arbitrations of three or more parties who have not consented to them. The Court may recognize the chimera of congested civil dockets (Pet. p. 20) as one frequently and facilely whistled up to frighten courts away from sound legal conclusions.

D. The Decision Itself Is Sound

That the decision in this case is soundly based in the Arbitration Act and principles of contract law is adequately shown by the lucid opinions of the Court of Appeals and the District Court (Pet. App. 1 & 3), and we therefore do not argue the point at length here.

CONCLUSION

For the foregoing reasons we submit that the Petition should be denied.

Respectfully submitted,

GRAYDON S. STARING
D. THOMAS MCCUNE
(Counsel of Record)
Counsel for Respondent
Karlander (Australia)
Pty. Ltd.

Office-Supreme Court, U.S.
FILED
OCT 29 1984
ALEXANDER L. STEVAS,
CLERK

No. 84-470

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1984

WEYERHAEUSER COMPANY,
Petitioner,

vs.

TRANS-PACIFIC SHIPPING CO., as successor in interest to
WESTERN SEAS SHIPPING COMPANY and
EASTERN SEAS SHIPPING COMPANY, and
KARLANDER (AUSTRALIA) PTY. LTD.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

JOHN A. FLYNN
Counsel of Record
GRAHAM & JAMES
One Maritime Plaza, Suite 300
San Francisco, CA 94111
(415) 954-0200
Counsel for Respondent

BOWNE OF SAN FRANCISCO, INC. • 190 NINTH ST. • S.F., CA 94103 • (415) 864-2300

QUESTION PRESENTED

Whether a District Court can properly order a consolidation, under the Federal Arbitration Act, of two separate arbitrations between different parties in the absence of the consent of the parties, where each arbitration arises under separate charter parties providing for different rights and obligations.

PARTIES INVOLVED

All parties to the proceeding below are named in the caption of the case in this Court as styled herein. Trans-Pacific Shipping Co. has altered the caption presented by petitioner Weyerhaeuser Company to reflect its proper status as party respondent as successor in interest to nominal respondents, Western Seas Shipping Co. and Eastern Seas Shipping Co.

TABLE OF CONTENTS

	Page
Questions presented	i
Parties involved	i
Statement	2
Reasons for denying the writ of certiorari	3
I	
The Alleged Conflicting Decisions Of The Ninth Circuit And The Second Circuit Are Distinguishable On Their Facts	3
II	
The Court Below Fully Considered And Correctly Decided The Question Of Consolidation	6
III	
The Questions Raised By Weyerhaeuser Do Not Merit Review	7
A. The Decision Below Will Neither Cause Confusion In The Maritime Industry Nor Disturb The Uniformity Of The Federal Maritime Law	7
B. The Arbitration Process Will Not Be Discouraged By The Decision Below	8
Conclusion	9

TABLE OF AUTHORITIES

Cases

Page

Compania Espanola de Petroleos, S.A. v. Nereus Shipping, S.A., 527 F.2d 966 (2d Cir. 1975), *cert. denied*, 426 U.S. 936 (1976) 3, 4, 5, 6

Mediterranean Enterprises, Inc. v. Ssangyong, 708 F.2d 1458 (9th Cir. 1983) 6

United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574, 80 S.Ct. 1347, 4 L.Ed.2d 1409 (1960) 5, 6

Statutes

9 U.S.C.:

§ 3 6

§ 4 6

§ 5 6

§ 9 6

§ 10 6

§ 11 6

Rules

Federal Rules of Civil Procedure:

42(a) 4

81(a)(3) 7

Other

Gilmore & Black, *The Law of Admiralty* (2d Ed. 1975) 5, 8

4 Wright & Miller, *Federal Practice and Procedure*, § 1015 7

No. 84-470

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1984

WEYERHAEUSER COMPANY,
Petitioner,

VS.

TRANS-PACIFIC SHIPPING CO., as successor in interest to
WESTERN SEAS SHIPPING COMPANY and
EASTERN SEAS SHIPPING COMPANY, and
KARLANDER (AUSTRALIA) PTY. LTD.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

RESPONDENT'S BRIEF IN OPPOSITION

Respondent, Trans-Pacific Shipping Co. (hereinafter "Trans-Pacific"), respectfully requests that this Court deny the petition for a writ of certiorari seeking review of the Ninth Circuit's opinion in this case. That opinion is reported at ..... F.2d .....

STATEMENT

Trans-Pacific, owner of the M/V PACDUKE and M/V PACDUCHESS, supplements and corrects the statement of facts by Weyerhaeuser in its petition (p. 4-9) with the following undisputed facts relevant to this case. At the time Weyerhaeuser reached agreement with Karlander on the subcharters of the two vessels, Weyerhaeuser did not have Trans-Pacific's permission to enter into such subcharters. When Weyerhaeuser sought such permission, Trans-Pacific secured an addendum to each of its charter agreements with Weyerhaeuser which insulated Trans-Pacific from any increase in its obligations by reason of the subcharters.

In particular, Weyerhaeuser agreed to indemnify and hold "owners harmless from and against all losses, costs, risks or expenses of any nature whatsoever suffered by owners during such sublet, which would not have been otherwise incurred by owners had the vessels not been sublet to Karlander...." (Pet. A-3 to A-4). Although consenting to the sublet of the vessels to Karlander, Trans-Pacific expressly did not consent to, or approve of, the terms of the subcharter agreements. Weyerhaeuser agreed that the subcharters would neither increase owner's obligations nor diminish owner's rights under the head charters with Weyerhaeuser. (C.R. 32-33 and 58-59.) The subcharter agreements between Weyerhaeuser and Karlander do not contain any such indemnity or hold harmless provisions.

The District Court and the Court of Appeals, in reaching their respective decisions, each noted and partially relied upon the indemnity provisions which were unique to the Trans-Pacific charter arrangements with Weyerhaeuser.

Pet. A-3 to A-4 and A-11.) The District Court noted that to order a consolidated arbitration among the three parties would directly contravene the contractual agreement which protected Trans-Pacific from any increase in its obligations by reason of any subcharter to Karlander by Weyerhaeuser (Pet. A-11). The Court of Appeals cited the same contract provisions while noting that the parties to this case clearly did not intend or consent to consolidated arbitrations. (Pet. A-3 to A-4.)

Contrary to Weyerhaeuser's assertion in its petition, Weyerhaeuser was not a "mere conduit". Weyerhaeuser had a contractual relationship with Karlander which imposed certain obligations, and a separate, different contract with Trans-Pacific which imposed greater obligations on Weyerhaeuser. A novation did not occur when Weyerhaeuser entered into the subcharters with Karlander and then agreed to indemnify and hold Trans-Pacific harmless by contractual addendum.

REASONS FOR DENYING THE WRIT OF CERTIORARI

I

THE ALLEGED CONFLICTING DECISIONS OF THE NINTH CIRCUIT AND THE SECOND CIRCUIT ARE DISTINGUISHABLE ON THEIR FACTS

The decision by the Court of Appeals below correctly observed that the rationale of the Second Circuit's decision in *Compania Espanola de Petroleos, S.A. v. Nereus Shipping, S.A.*, 527 F.2d 966 (2d Cir. 1975), *cert. denied*, 426 U.S. 936 (1976), rested on implicit, if not express, consent of the parties to joint arbitration. (Pet. A-3.) In *Compania Espanola* all three parties (owner, charterer and char-

terer's guarantor) executed an addendum to the charter party pursuant to which the guarantor assumed all the rights and obligations of the charterer on the very same terms and conditions set forth in the charter party. The guarantor expressly agreed to perform the balance of the charter contract upon receipt of notice by the owner that the charterer was in default under the charter.

On those facts, the Second Circuit held that the arbitration agreement in the charter party was binding on the guarantor because it had consented to be bound by the terms of the contract. 527 F.2d at 973. The Second Circuit noted that such facts presented a "proper case" for consolidation. 527 F.2d at 975. Actually, the issue of consolidated arbitrations did not have to be decided by the trial court or appellate court in *Compania Espanola* since the facts merely presented a case of three parties signatory to one contract with each party having agreed to arbitration. There simply was no need to consolidate within the meaning of Rule 42(a) of the Federal Rules of Civil Procedure. *Compania Espanola* therefore is distinguishable from this case where there are two separate, independent and different contracts. Subsequent decisions by the Southern District of New York have blindly followed the dictum as to consolidation in *Compania Espanola.* (See cases cited in Pet. p. 14 in footnote 11.)

Contrasted with the facts in *Compania Espanola,* in this case, Trans-Pacific did not expressly or implicitly consent to arbitration with Karlander. This is not a case of three signatories to one contract, but rather a case of separate contracts with different obligations and responsibilities. Trans-Pacific expressly disavowed any relationship with

Karlander and obtained an express contractual commitment from Weyerhaeuser that Trans-Pacific would be held harmless from any cost, expense or liability arising from the subcharters to Karlander. The contractual expectation of Trans-Pacific was that it would be insulated by Weyerhaeuser from any involvement whatsoever with Karlander.

Contrary to the assertion by Weyerhaeuser, this is not a case where Weyerhaeuser was a "mere conduit" or "innocent middleman". (Pet. 6-7 and 19-21.) By subchartering the vessels to Karlander, Weyerhaeuser did not secure a novation of its contractual responsibilities to Trans-Pacific. Weyerhaeuser contractually assumed the risks of potential liability to Karlander with no right of indemnity from Trans-Pacific. By virtue of the separate indemnity and hold harmless provisions which Weyerhaeuser provided to Trans-Pacific (without any corresponding provisions in its subcharters with Karlander), Weyerhaeuser assumed duties owing to Trans-Pacific which were greater and materially different from the duties owed by Karlander to Weyerhaeuser. The Ninth Circuit correctly distinguished this case from the Second Circuit's decision in *Compania Espanola*.

Since arbitration is a creature of contract and rests on the consent of the parties, some basis in fact must exist for finding consent, either expressly or implicitly, of the parties to consolidation. A charter party is a maritime contract and is subject to interpretation under the requirements of contract law. Gilmore & Black, *The Law of Admiralty*, 195 (2d Ed. 1975). A court may not force a party to arbitrate when, under principles of contract law, it has not agreed to do so. *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582, 80 S. Ct. 1347,

1353, 4 L.Ed.2d 1409, 1417 (1960); *Mediterranean Enterprises Inc. v. Ssangyong,* 708 F.2d 1458, 1463 (9th Cir. 1983). Trans-Pacific has not agreed to arbitrate with Karlander.

By reason of the addendum to the head charters entered into by Trans-Pacific and Weyerhaeuser, this case is distinguishable on its facts from the Second Circuit's decision in *Compania Espanola.* No square conflict exists between the decisions of the Ninth Circuit and the Second Circuit.

II

THE COURT BELOW FULLY CONSIDERED AND CORRECTLY DECIDED THE QUESTION OF CONSOLIDATION

Trans-Pacific contends, as set forth in Section I, that the unique facts and confusing record in *Compania Espanola, supra,* do not allow that case to be read as holding that a District Court is authorized to consolidate two arbitrations arising under two separate contracts. However, if and to the extent that *Compania Espanola* is so interpreted, the Ninth Circuit in this case correctly decided not to follow that course. Under the Federal Arbitration Act the power and authority of a District Court is limited. The Act provides that a District Court may stay an action brought in a U.S. District Court on an issue referable to arbitration (9 U.S.C. § 3); order a party to proceed to arbitration (9 U.S.C. § 4); appoint an arbitrator upon application of a party (9 U.S.C. § 5); issue an order confirming an arbitration award (9 U.S.C. § 9); vacate an arbitration award under certain circumstances (9 U.S.C. § 10); and modify or correct an arbitration award (9 U.S.C. § 11). These are the only instances in which a U.S. District Court is empowered to act under the Federal Arbitration Act.

Rule 81(a)(3) of the Federal Rules of Civil Procedure authorizes the use of the Federal Rules only in the above-mentioned judicial proceedings under the Arbitration Act. The Federal Rules do not apply to the procedure of arbitration hearings. Wright & Miller, *Federal Practice and Procedure,* Vol. 4, § 1015 at p. 81. The Ninth Circuit correctly recognized this distinction and the limited role of the Federal Rules in judicial proceedings arising under the Federal Arbitration Act. (Pet. A-4 to A-5.)

III

THE QUESTIONS RAISED BY WEYERHAEUSER DO DO NOT MERIT REVIEW

A. The Decision Below Will Not Cause Confusion in the Maritime Industry Nor Disturb the Uniformity of the Federal Maritime Law

Trans-Pacific agrees with Weyerhaeuser that charter parties routinely include arbitration provisions as a means for resolving disputes between the parties to the charter. The decision of the Ninth Circuit in this case, however, will not destroy the effectiveness of arbitration as a means for resolving disputes. On the contrary, the decision of the Ninth Circuit will promote arbitration as a means for resolving disputes since it honors the contractual expectations of the parties. If the parties do not provide for or agree to consolidated arbitrations, consolidation ought not to be forced upon them in contravention of their contractual expectations. If and to the extent that owners, charterers and subcharterers desire consolidated arbitrations, such can be readily accomplished by so providing in their respective contracts. The Ninth Circuit's decision does not prohibit consolidation of arbitration. The parties are free to consent to consolidation by contract or stipulation.

The decision below honors the legitimate contractual expectations of the parties and will not disturb existing or future chartering practice in the maritime industry. Parties will be free to consent to consolidated arbitration or pursue separate arbitration pursuant to contract.

As noted by Weyerhaeuser (Pet. p. 17), "[t]he law of charters is . . . federal law, as to which uniformity is required." Gilmore & Black, *The Law of Admiralty,* 196 (2d Ed. 1975). What Weyerhaeuser ignores, however, is that a charter party is merely a contract and, thus, points of law arising thereunder are governed by the same rules and principles of ordinary contract law. Gilmore & Black, *The Law of Admiralty,* 195-6 (2d Ed. 1975). Owners and charterers are still free to contract or consent by stipulation to consolidated arbitration. The Ninth Circuit's decision does not alter or disturb the uniformity of the federal maritime law.

B. The Arbitration Process Will Not Be Discouraged by the Decision Below

The decision below will not deter owners and charterers from inserting valid and enforceable arbitration clauses in their charter parties. The arbitration procedure remains as an expedient and inexpensive means for maritime interests to resolve their disputes. If the parties wish, they may contractually provide for consolidated arbitration or consent to consolidation after disputes arise. There is no reason to believe, and no evidence to support, that proceeding by separate arbitrations in the absence of consent to consolidation will compel parties to decline arbitration in favor of litigation in the courts. The contention by Weyerhaeuser that separate arbitrations will be more expensive and time consuming than consolidated arbitrations misses

the point. Parties to a contract should not be forced to arbitrate their disputes in a manner or method inconsistent with their respective contractual rights.

CONCLUSION

The decision of the Ninth Circuit is distinguishable on its facts from the decision of the Second Circuit. The question of consolidation was correctly decided by the Ninth Circuit in this case. The decision honors the legitimate contractual rights and expectations of the parties. Neither the arbitration process nor the uniformity of the maritime law will be disturbed by the decision below.

For all these reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

JOHN A. FLYNN
Counsel of Record
GRAHAM & JAMES
Counsel for Respondent
Trans-Pacific Shipping Co.

Office - Supreme Court, U.S.
FILED
NOV 9 1984
ALEXANDER L. STEVAS
CLERK

No. 84-470

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

WEYERHAEUSER COMPANY,
Petitioner,

v.

TRANS-PACIFIC SHIPPING CO., as successor in interest to
WESTERN SEAS SHIPPING COMPANY,
EASTERN SEAS SHIPPING COMPANY, and
KARLANDER (AUSTRALIA) PTY. LTD.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

PETITIONER'S REPLY MEMORANDUM

Of Counsel:
JOHN M. ANDERSON
AMY SLATER
LANDELS, RIPLEY & DIAMOND
450 Pacific Avenue
San Francisco, CA 94133

RICHARD H. SOMMER
WILLIAM XANTTOPOULOS
ARTHUR E. HOFFMANN, JR.
KIRLIN, CAMPBELL & KEATING
120 Broadway
New York, NY 10271

DONALD I. BAKER
Counsel of Record
JOHN R. MUNICH
SUTHERLAND, ASBILL & BRENNAN
1666 K Street, N.W., Suite 800
Washington, D.C. 20006
(202) 872-7800
Counsel for Petitioner

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	i
ARGUMENT	1

TABLE OF AUTHORITIES

Cases:

Compania Espanola de Petroleos, S.A. v. Nereus Shipping, S.A., 527 F.2d 966 (2d Cir. 1975), *cert. denied*, 426 U.S. 936 (1976) 2, 3, 5, 6

Other:

G. Gilmore & C. Black, Jr., *The Law of Admiralty*, (2d ed. 1975) 3, 4

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

No. 84-470

WEYERHAEUSER COMPANY,
Petitioner,

v.

TRANS-PACIFIC SHIPPING CO., as successor in interest to
WESTERN SEAS SHIPPING COMPANY,
EASTERN SEAS SHIPPING COMPANY, and
KARLANDER (AUSTRALIA) PTY. LTD.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

PETITIONER'S REPLY MEMORANDUM

Respondents, in their opposing briefs in this matter, have substituted rhetoric and error for any serious analysis of the issues presented by Weyerhaeuser's petition. Weyerhaeuser need not burden the Court with a point by point rebuttal of respondents' generally peripheral contentions. It respectfully suggests, however, that respondents' arguments lack merit in several material respects.

1. The respondents (and especially Karlander), in a vain attempt to argue that no conflict exists between the Ninth Circuit's opinion below and the Second Circuit's

decision in *Compania Espanola de Petroleos, S.A. v. Nereus Shipping, S.A.*, 527 F.2d 966 (2d Cir. 1975), *cert. denied*, 426 U.S. 936 (1976), assert that the court in *Compania Espanola* did not decide what it clearly did decide. Karl. at 3; Trans Pac. at 4. In essence, both respondents argue that the Second Circuit did not decide, *or did not need to decide*, whether a federal district court has the authority to order consolidation of separate arbitrations concerning common questions of law and fact. Regardless of whether the Second Circuit needed to decide this question (which goes to the merits of the Second Circuit's rule and not to whether a certiorari-worthy conflict exists), it is quite clear that the argument advanced by respondents is simply wrong. As respondent Trans-Pacific itself notes, federal district courts in the Second Circuit "have blindly followed" the rule that a district court may order consolidation. Trans Pac. at 4. Having conceded (as they must) that all these district courts have read *Compania Espanola* as establishing this rule, how can respondents steadfastly refuse to admit that *Compania* stands for such a proposition?

2. Karlander facilely suggests that the Ninth Circuit's decision in this case presents no problems of confusion or uncertainty because parties to charter agreements may choose the rule they want applied concerning the question of consolidation merely by inserting in the charter party "New York" or "San Francisco" as the situs of any arbitration that arises. Karl. at 8. This suggestion, however, does nothing for charterers (such as Weyerhaeuser) who are already parties to *existing* charter agreements in which "Seattle" or "San Francisco" has been designated as the location for any arbitration that takes place. *See* Pet. for Certiorari at 15-16. Moreover, Karlander's suggestion overlooks the practical reality that charter agreements are usually arrived at by telex between commercial men who may or may not be familiar

with all the nuances of what Karlander calls the "cloudy opinion in *Compania Espanola*." Karl. at 3.[1]

3. The respondents argue that there is "no problem" as to admiralty uniformity. Karl. 9; *see also* Trans. Pac. at 8. They seem to confuse the question of general uniformity in doctrine with the right of parties to contract for a special rule in their own case. It is well known that ships are frequently chartered and subchartered, and subsubchartered. In such a complex commercial environment, the risk of uncertainty and dispute is greatly enhanced if there is confusion as to the underlying rule against which the parties are contracting. Weyerhaeuser proposes a clear and well-established rule: that consolidation can be ordered (as it was in *Compania Espanola*) when the interests of justice are served thereby. The practical difficulties inherent in Karlander's suggestion that the rule can turn on whether the parties designate "New York" or "San Francisco" as the arbitration situs underscores Gilmore and Black's point (quoted by Trans-Pacific at 8) that, "[t]he law of charters is . . . federal law, as to which uniformity is required." G. Gilmore & C. Black, Jr., *The Law of Admiralty* 196 (2d Ed. 1975).

4. Both Karlander and Trans-Pacific devote a considerable portion of their briefs to the argument that the hold-harmless clause in the addendum to the head charter between Trans-Pacific and Weyerhaeuser somehow prevents consolidation of the two arbitrations at issue in this case. Karl. at 6; Trans-Pac. at 5. This argument is, quite simply, wholly lacking in merit. The clause in the contract itself states that Weyerhaeuser shall hold "'[Trans-Pacific] harmless from and against all losses, costs, risks or expenses of any nature whatsoever suffered by [Trans-Pacific] during such sublet, which *would not*

---

[1] Arbitration situs has been traditionally selected for the convenience of the parties. Karlander would import into the choice a forum-shopping element which may be at odds with the parties' natural instinct and/or convenience.

have been otherwise incurred by [Trans-Pacific] had the vessels not been sublet to Karlander. . . .'" Pet. for Certiorari, Appendix 1, at A-4 (emphasis added).[2] Had Weyerhaeuser wished to stow containers below the decks of the PACDUKE and PACDUCHESS, precisely the same dispute would have arisen between Trans-Pacific and Weyerhaeuser as currently exists between Weyerhaeuser and Karlander. Nowhere in its brief does either respondent suggest how this dispute and consolidated arbitrations concerning it are within the scope of the hold-harmless clause.[3]

5. Respondents offer bald assertions that the use of arbitration will not be discouraged by the decision below. Trans-Pac. at 8; Karl. at 10. The respondents do not deny (as they cannot) that separate arbitrations are likely to be more expensive and time consuming than a consolidated arbitration. See Trans-Pac. at 8-9. Instead, they are content to argue that, even with the Ninth Circuit decision, "[t]he arbitration procedure remains as an expedient and inexpensive means for maritime interests

---

[2] Both respondents and the Ninth Circuit neglected to point out that the clause continued, "but it is not intended to place on [Weyerhaeuser] any obligation relating to the *navigation or management of the vessel.*" CR 32-33 (emphasis added). This is consistent with standard practice under a time charter, where the vessel remains under the owner's control and management. G. Gilmore & C. Black, Jr., *The Law of Admiralty* 193-94 (2d ed. 1975). It is totally inconsistent, however, with Trans-Pacific's glib suggestion to this court that it expected it "would be insulated by Weyerhaeuser from any involvement whatsoever with Karlander." Trans-Pac. at 5.

[3] Likewise, given the nature of a time charter and the dispute at the core of this case, it is particularly unclear how Trans-Pacific can support its claim that Weyerhaeuser "assumed duties owing to Trans-Pacific which were greater and materially different from the duties owed by Karlander to Weyerhaeuser." Trans-Pac. at 5. The dispute here had concerned "the navigation or management of the vessel", where Trans-Pacific's duties were identical under both the charter and the subcharter. This being so, it is hard to see how Trans-Pacific's statement is relevant or true.

to resolve their disputes." Trans-Pac. at 8. This misses the obvious practical point: the arbitration process remains attractive only to the extent that it is cheaper and swifter than judicial remedies; to the extent that these advantages are reduced, *some* parties will foreswear the arbitration process and rely on judicial remedies. How large or small this group may be is something that neither petitioner nor respondents know. If respondents have their way, however, the federal courts will find out in due course.

6. Respondents' reluctance to participate in consolidated arbitrations and their whipsaw tactics in this case mimic the tactical posturing displayed by the party opposing consolidation in *Compania Espanola*. The Second Circuit stated there that "if successful, this strategy would be very advantageous to [the party opposing consolidation] and very prejudicial to [the other parties] . . . ." 527 F.2d at 970. Recognizing this, the court confirmed the authority of a district court to consolidate arbitrations in part because of the "great and irreparable injustice" that can result to the common party in the absence of consolidation, 527 F.2d at 968, and because the "interest of justice" is served by obviating the possibility of conflicting findings through consolidation of the arbitrations. 527 F.2d at 974. In the instant matter, respondents seek to hide behind technical common law concepts such as "privity," Karl. at 6, and "novation," Trans-Pac. at 3, in order to pursue their tactical objective of separate arbitrations.[4] Not surprisingly, neither re-

[4] The respondents' tactical goals are obvious. See Petition for Certiorari, 18-19 n. 17. Karlander wishes to try its claim that the owner's refusal was unreasonable against Weyerhaeuser, which it knows does not directly possess the evidence necessary to defend the claim. Meanwhile, Trans-Pacific wishes to have two bites at the apple on liability: it wants Weyerhaeuser to defend the claim (presumably with evidence obtained from Trans-Pacific) in the first arbitration; and, if Weyerhaeuser is unsuccessful, then it wishes to be able to re-litigate the same issues against Weyerhaeuser

spondent, at any point in its brief, addresses the Second Circuit's very legitimate concerns regarding "the interest of justice" and "danger of conflicting findings." 527 F.2d at 974. The court in *Compania Espanola*, unlike the Ninth Circuit, recognized the injustice of the tactics used by respondents here and held that district courts may consolidate arbitrations in such instances. 527 F.2d at 975. This Court should grant certiorari in the instant matter so that it may review and reverse the contrary decision of the Ninth Circuit.

Respectfully submitted,

Of Counsel:
JOHN M. ANDERSON
AMY SLATER
LANDELS, RIPLEY & DIAMOND
450 Pacific Avenue
San Francisco, CA 94133

RICHARD H. SOMMER
WILLIAM XANTTOPOULOS
ARTHUR E. HOFFMANN, JR.
KIRLIN, CAMPBELL & KEATING
120 Broadway
New York, NY 10271

DONALD I. BAKER
Counsel of Record
JOHN R. MUNICH
SUTHERLAND, ASBILL & BRENNAN
1666 K Street, N.W., Suite 800
Washington, D.C. 20006
(202) 872-7800
Counsel for Petitioner

---

before a different arbitral panel. In each arbitration, Weyerhaeuser is inevitably at a disadvantage vis-a-vis a party with direct evidence on the conflict. Respondents know this and that is why they are fighting so hard to avoid the teaching of *Compania Espanola*.